SUPREME COURT, U. S.
JAN 28 1971
R. ROBERT SEAVER, CLERK

APPENDIX

# Supreme Court of the United States

OCTOBER TERM, 1970

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No. 5247

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BARRINGTON JOSEPH JOHNSON,
*Petitioner,*

*v.*

UNITED STATES,
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR CERTIORARI FILED MAY 18, 1970
CERTIORARI GRANTED OCTOBER 19, 1970

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# CRIMINAL DOCKET

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 335-67

UNITED STATES

U.S. Attorney—Nunzio

vs.

BARRINGTON JOSEPH JOHNSON (27)

—Attorneys
S. F. Ianni—Investment Bldg.
W. J. Lippman, 1824 R St., N.W.—Appeal

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G. J. No. 189-67

Charge: RAPE

(22 DCC 2801)

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| Date | Proceedings |
|---|---|
| 1967 Mar. 27 | Presentment and Indictment filed (1 count) |
| 1967 Mar. 27 | Copy of Indictment mailed to Deft. Cert. filed. |
| 1967 Apr. 7 | Indictment Read; Arraigned; Plea Not Guilty entered; Case is referred for appointment of counsel; Defendant on bond; Attorney Kirby Howlett present for Arraignment only. Curran, C.J. (Reported—H. Kaitz). Cert. filed. |
| 1967 Apr. 12 | Affidavit of Financial Status CJA Form 3a and Order appointing Samuel F. Ianni as counsel to defend, filed. (N) (4-10-67). Curran, C.J. |

| Date | Proceedings |
|---|---|
| 1967 Aug. 9 | Defendant did not report to precinct; Personal Bond revoked; Bench Warrant ordered and issued. Curran, C.J. (Reporter A. Vaughn) |
| 1967 Sep. 13 | Bench Warrant issued 8-9-67 returned executed; Defendant Committed to the District of Columbia Jail; Commitment issued. |
| 1967 Sep. 20 | Letter from defendant in the nature of reinstatement of Personal Bond, filed. |
| 1967 Sep. 22 | Motion of defendant for consideration of re-release on Personal Bond, And Affidavit of defendant in support thereof, filed. |
| 1967 Oct. 5 | Bail Agency Report, filed. |
| 1967 Oct. 20 | Motion of defendant for consideration of re-release on personal bond and or to set aside order of 8-9-67 and re-instate release on personal bond, heard and granted; Bond re-instated; Defendant released; release issued; Attorney Samuel F. Ianni present; Gasch, J. (Reporter—Arlene Vaughn). Cert. filed. |
| 1968 Jan. 15 | Bench Warrant Ordered and Issued, bond revoked. Robinson, J. (Rep.: E. Wells). |
| 1968 Jan. 15 | Bench Warrant Withdrawn, Bond reinstated. Curran, C.J. |
| 1968 Jan. 17 | Jury sworn on voir dire; jury and two alternates sworn; Trial begun; respited until 1/18/68 at 10:00 a.m., Defendant on bond. Attorney Daniel F. Ianni present. Corcoran, J. (Reporter—Eva Sanche) Cert. filed. |
| 1968 Jan. 18 | Motion for issuance of subpoena, Granted. Corcoran, J. (N). |
| 1968 Jan. 18 | Trial resumed; same jury and two alternate jurors; trial respited until Jan. 19, 1968 at 10:30 a.m. Bond C F. Corcoran, J. (Rep: Eva Sanche). |

| Date | Proceedings |
|---|---|
| 1968 Jan. 19 | Trial Resumed; same jury and alternate jurors; trial respited until January 22, 1968 at 10:00 a.m. Defendant on Bond. Attorney D. Ianni, present. Corcoran, J. (Reporter—E. Sanche). Cert. filed. |
| 1968 Jan. 22 | Trial Resumed; same jury and alternate jurors, alternate jurors discharged, Jury retires to begin deliberations; Verdict: Guilty as Charged. Case referred to Probation Officer of the Court. Defendant Committed; Commitment issued. Attorney S. Ianni present. Corcoran, J. (Rep: K. Byrholdt) Cert. filed. Defendants requested instructions (3) granted in substance, filed. |
| 1968 Feb. 23 | Application to proceed on Appeal without prepayment of costs, filed. |
| 1968 Feb. 23 | Sentenced for period of Six (6) Years to eighteen (18) Years. Defendant remanded to D.C. Jail. Attorney Samuel Ianni present. Corcoran, J. (Reporter E. Sanche). |
| 1968 Feb. 23 | Judgment and Commitment of 2-23-68, filed (N). Corcoran, J. |
| 1968 Feb. 26 | Transcript of Proceedings of February 23, 1968, filed. Clerk's Copy. (Reporter—E. M. Sanche). |
| 1968 Mar. 8 | Order authorizing defendant to proceed on Appeal without prepayment of costs, for preparation of transcript at expense of United States except voir dire and opening and closing statements of counsel and Referring appointment of counsel to the U.S. Court of Appeals, filed. Corcoran, J. (N) |
| 1968 Mar. 22 | Affidavit in support of application to proceed on Appeal without prepayment of costs, filed. |
| 1968 Mar. 25 | Copy of Appeal given to U.S. Attorney and U.S. Court of Appeals. |

| Date | Proceedings |
|---|---|
| 1968 Apr. 25 | Certified copy of Order, U.S. Court of Appeals 4-24-68 appointing William J. Lippman, and extending time for filing until transcript is filed, filed. |
| 1968 May 8 | As of 2-23-68; Oral motion for Appeal Bond, Denied. Corcoran, J. C. F. Reporter—Sanche. Samuel Ianni, Esq. |
| 1968 May 14 | TR PRO of January 22, 1968-pages 501-562 Clerk's Copy, Rep. Byrholdt. |
| 1968 May 29 | Cert. copy of Order of USCA denying appellant's application for bail pending appeal. |
| 1968 Jun. 3 | Cert. copy of Order USCA 5-29-68 for preparation of transcript at expense of U.S. of 2-10-67, 8-9-67, 10-20-67, Voir Dire and opening statements and closing arguments and for transmittal as part of original record. |
| 1968 July 9 | TR of PRO, Jan. 22, 1968, pages 1-47. Court Copy (Rep: K. Byrholdt). |
| 1968 July 15 | TR of PRO, Aug. 9 and Oct. 20, 1967, pages 1-3 and pages 1-8. Court copy. (Rep: A. Vaughn). |
| 1968 July 23 | TR PRO Vol. 1, pages 1-82, 1-17-68, Clerk's copy—Rep: E. Sanche. Vol. 2, pages 83-261, 1-18-68, Clerk's copy—Rep: E. Sanche. Vol. 3: pages 262-500, 1-19-68, Clerk's copy—Rep: E. Sanche. |
| 1968 Sep. 5 | TR of PRO, pages 1-8, 2-10-67, Clerk's copy —Reporter: Hatch. Filed. |

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

Criminal No. 225-67

UNITED STATES OF AMERICA,

*Plaintiff*

v.

BARRINGTON JOSEPH JOHNSON,

*Defendant*

Washington, D.C.

11:30 A.M., February 19, 1967

The above-named case came on for hearing on the motion for release on personal bond before The Honorable Oliver Gasch, U.S. District Judge.

APPEARANCES:

In behalf of the Government:
DANIEL J. McTAGUE,
Assistant United States Attorney

In behalf of the Defendant:
KIRBY HOWLETT, ESQUIRE

PROCEEDINGS

THE DEPUTY CLERK: Case of United States versus Barrington Joseph Johnson. Mr. McTague for the Government. Mr. Howlett for the defense.

MR. HOWLETT: If your Honor please, this is the last motion for the release on personal recognizance of Mr. Johnson who is charged in Grand Jury 189-67, with the crime of rape. No bond has been set at Mr. Johnson's last appearance before U.S. Commissioner on February 2. I would urge that at this time, Your Honor, if Your Honor would see fit to set a bond and then if Your Honor would see fit to release Mr. Johnson on his personal recognizance. Mr. Johnson has resided at 748 Brandywine Street, S.E., for the last 7 months with his wife and children. Prior to

that time, he resided at 1614 T Street, N.W., and 1905 M Street, N.E., for the last five years also with his family. At the time of his arrest he was employed working part time for the Henry Fuel Company, 4640 Minnesota Avenue, where he had worked regularly for the last five years; at the time of his arrest he was temporarily laid off due to the weather from the firm of Corson & Grumlett, 33rd and K Street, N.W., which was his regular job.

This company has been contacted and they indicated if Mr. Johnson is released he will be able to return to work there.

THE COURT: Is that Corson & Grubman or Henry Fuel Company?

He has one prior conviction for assault, in the Court of General Sessions and was placed on probation for 3 years. Probation was not revoked. Mr. McTague and I have agreed upon an order, if Your Honor would consider this with appropriate conditions. Specifically, residences of Brandywine Street, with his wife and family; employment at Corson and Grubman, and a precinct report.

THE COURT: Mr. McTague?

MR. McTAGUE: Your Honor, this is a charge of rape. Of course, it is a capital offense. However, the evidence of force in this case is not strong. And even though there is this prior charge which was originally rape or assault with intent to rape which eventually ended up in a simple assault case, I believe that this defendant will continue to live with his wife and family and will appear in court.

THE COURT: What was the 1962 plea?

MR. McTAGUE: It was to simple assault and the motion has it as assault with intent to rape, but the police report shows it as simple assault.

MR. HOWLETT: If Your Honor please, Mr. Johnson was represented on that charge by an attorney by the name of Scallon. I was representing Mr. Johnson before the U.S. Commissioner. At the time I saw him I had no indication that another attorney might be in the case. Mr. Scallon called me after my interview with Mr. Johnson and indicated he was going to take the case.

However, on the day of the hearing, Mr. Scallon called me back and said that he didn't feel he could take it because of insufficient money for retention.

He filed the motion which is before Your Honor after both he and I had verified the information that is contained therein.

Mr. McTague is correct. He was con—— He plead guilty to simple assault and not assault with intent to rape.

THE COURT: Let me see your order.

Mr. McTague?

MR. McTAGUE: Yes, Your Honor.

THE COURT: Has the Bail Agency made a recommendation in this case?

MR. McTAGUE: They do not usually recommend in capital cases.

MR. DERWOOD: I have a copy of our report here. Our policy in this type of case, Your Honor, is not to make a recommendation until the Court determines whether or not bond will be set.

THE COURT: What did you tell me about Corson & Grubman?

MR. HOWLETT: I verified that. Mr. Scanlon did not. I talked to a Mr. Winter at Corson & Grubman and he verified the fact that Mr. Johnson had been laid off on January 9, due to the weather and could return at any time.

I did not verify the employment with Henry Fuel Company.

THE COURT: How long has he worked for Corson & Grubman?

MR. HOWLETT: I believe since March 1966.

Since March of 1966, which I have down here. I verified that.

I was wrong. I though that Mr. Scanlon had verified that. Mr. Scanlon verified that Henry Fuel Company employment.

And I did not verify the Henry Fuel Company employment.

Mr. Johnson states that he was working for Mr. Henry at the Henry Fuel Company at the time of his arrest and in fact has money coming to him from that company right now.

THE COURT: When did the defendant work for the Henry Fuel Company?

MR. HOWLETT: Prior to his being laid off.

THE COURT: How long prior?

MR. HOWLETT: In March. For four years according to verification by Mr. Scanlon.

THE COURT: When is the last time he worked for the Henry Fuel Company?

MR. HOWLETT: Prior to March of 1966. No, he was working in there until he went with Corson & Grubman in March, 1966, and then Mr. Johnson indicates to me and Mr. Scanlon has verified it that he was working at Henry Fuel Company at the time of his arrest since October of 1966. When he was laid off from Corson & Grubman due to the weather.

THE COURT: The Bail Agency report indicates that the defendant has not worked for Henry since March of 1966.

MR. DERWOOD: I may be able, Your Honor, to clarify a bit of this. According to our interview, the defendant was simultaneously employed by Henry Fuel Company and by Corson & Grubman. As of March of 1966, he ceased working for Henry Fuel Company but continued to work with Corson & Grubman. That is not in our report but it is here on our interview report and when it was typed up there was a transcription error and he was working for Corson & Grubman as far as we know and was laid off because of the weather.

THE COURT: Is it your indication that he worked for the Henry Fuel Company since March 1966?

MR. HOWLETT: My indication both from conversation with Mr. Scanlon and what Mr. Scanlon stated in the motion which he verified.

I didn't verify Henry Fuel. I verified Corson & Grubman.

THE COURT: You concur in this release motion?

MR. McTAGUE: Yes.

THE COURT: Very well.

MR. HOWLETT: Thank you, Your Honor.

If Your Honor please, may I address the court on one very brief matter?

(Whereupon, the above-captioned matter having been concluded, the Court entertained subsequent motions as indicated by the day's calendar.)

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CERTIFICATE
(omitted in printing)

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

Criminal No. 335-67

UNITED STATES OF AMERICA

*v.*

BARRINGTON JOSEPH JOHNSON,
*Defendant*

Washington, D.C.
Wednesday, January 17, 1968

The above-entitled matter came on for trial before the HONORABLE HOWARD F. CORCORAN, United States District Judge, and a jury at 1:45 p.m.

APPEARANCES:

On behalf of the Government:
NICHOLAS NUNZIO, ESQ.
Assistant United States Attorney

On behalf of the Defendant:
SAMUEL F. IANNI, ESQ.

PROCEEDINGS

THE DEPUTY CLERK: Criminal Case No. 335-67, United States versus Barrington Joseph Johnson. Mr. Nunzio for the Government and Mr. Ianni for the defendant.

MR. NUNZIO: The Government is ready, Your Honor.

MR. IANNI: The defense is ready, Your Honor.

THE COURT: Very well. Will you swear the panel.

(Whereupon, the prospective jurors were duly sworn.)

THE COURT: You may proceed, Mr. Nunzio.

MR. NUNZIO: Thank you, Your Honor.

*VOIR DIRE EXAMINATION*

MR. NUNZIO: May it please the Court, ladies and gentle-

ment of the prospective panel, the case that some of you will be selected to hear is entitled United States of America versus Barrington Joseph Johnson.

This is a criminal case. It is a capital case. The defendant is charged with rape, which is a violation of Title 22, Section 2801 of the District of Columbia Code.

My name is Nicholas Nunzio. I am the Assistant United States Attorney who will present this case on behalf of the Government.

Mr. Johnson, will you please stand and face the prospective jurors.

(The defendant complied.)

MR. NUNZIO: Thank you, sir. You may be seated.

Mr. Johnson, ladies and gentlemen of the prospective jury, is represented by Mr. Samuel Ianni, an attorney in the District of Columbia—

Where are your offices located, Mr. Ianni?

MR. IANNI: At 15th and K Streets.

MR. NUNZIO: Thank you.

Do any of the members of the prospective panel know either myself, the defendant, or Mr. Ianni?

(No response.)

MR. NUNZIO: I take it, then, by your silence that you do not.

The alleged offense, ladies and gentlemen of the prospective panel, took place on or about the 22nd of January 1967. The alleged rape took place in the District of Columbia.

Briefly, the facts are that the complainant was taken from the grounds of St. Elizabeths Hospital where she was working at the time, and then returned to the grounds later on.

Now, my reason for stating that simply is this: To my knowledge there has been no publicity through any of the news media, either through radio, television or newspaper. However, I am asking you to go back into your minds and see if you can recall having read, seen or heard anything concerning an alleged rape having taken place on January 22nd, 1967, the victim of the alleged rape being an employee

of St. Elizabeths Hospital. The purpose for this is to select a jury who has no knowledge of the facts in the case.

Do any of you recall having read, seen or heard anything concerning the case and which some of you may be selected to hear?

(No response.)

MR. NUNZIO: I take it none of you have any prior knowledge concerning the facts of this case.

In support of its case, ladies and gentlemen, the Government may call all or some of the following witnesses:

If they are here, the witnesses will rise and face the prospective jury panel. Those of the witnesses who are not here, I will briefly identify them for the purposes of determining whether any of the jurors may know any of the witnesses.

The complainant, Mrs. Luella Essie Mayes. Will you stand, please.

(Witness Mayes stood.)

MR. NUNZIO: You are presently employed at St. Elizabeths, is that correct?

WITNESS MAYES: Yes.

MR. NUNZIO: In what ward?

WITNESS MAYES: Geriatrics.

MR. NUNZIO: Thank you. You may be seated.

(Witness complied.)

MR. NUNZIO: Do any of you know Mrs. Mayes?

(No response.)

MR. NUNZIO: Dr. William Chin is not here, ladies and gentlemen. He was the examining physician at D.C. General Hospital.

Do any of you know Dr. William Chin?

A JUROR: Is he Chinese?

MR. NUNZIO: Yes.

A JUROR: I am not sure about his first name.

MR. NUNZIO: Do you know him personally or in a professional capacity?

A JUROR: As a friend.

MR. NUNZIO: What is your name, ma'am?

JUROR KEEN: Gladys Keen.

MR. NUNZIO: In view of the fact, Mrs. Keen, should this be the same Dr. Chin, in view of the fact you know Dr. Chin as a friend, would this in any way prejudice you for or against the defendant if you were selected as a juror in this case?

JUROR KEEN: No, it would not.

MR. NUNZIO: Thank you.

Another witness who may be called to testify is Dr. Sophia Perry, D.C. General Hospital.

Do any of you know Dr. Perry. She is not here at this time.

(No response.)

MR. NUNZIO: Again, I take it by your silence that you do not.

Paul E. Hoffman, would you stand, please.

You are employed by St. Elizabeths Hospital, is that correct, sir?

WITNESS HOFFMAN: That is correct.

MR. NUNZIO: In what capacity?

WITNESS HOFFMAN: Guard Supervisor.

MR. NUNZIO: Do any of the prospective panel know Mr. Paul E. Hoffman, a guard at St. Elizabeths Hospital?

(No response.)

MR. NUNZIO: Ryland G. Hall.

(Prospective witness stood.)

MR. NUNZIO: Mr. Hall, you are also employed as a guard at St. Elizabeths Hospital?

WITNESS HALL: Yes, sir.

MR. NUNZIO: Do any of the prospective members of the jury panel know Mr. Hall?

(No response.)

MR. NUNZIO: Again, I take it by your silence that you do not.

Mr. Joseph B. Hill is not here at the present time, ladies and gentlemen. He, also, is a guard at St. Elizabeths Hospital.

Do any of you know any guard by the name of Joseph B. Hill, employed at St. Elizabeths Hospital?

(No response.)

MR. NUNZIO: Again, by your silence I take it you don't know such a person. I realize this is meager information to give you in asking you to identify someone with this minimum amount of information. If you think you know them, please don't hesitate to indicate that you think you do.

Mr. Jerry Aldrich, last known address is 3117 Nichols Avenue, Southeast here in the District of Columbia. He may or may not be called as a Government witness.

Do any of you know one Jerry Aldrich who may have lived at that address?

(No response.)

MR. NUNZIO: Again, I take it by your silence that you do not.

Patricia M. Godwin of the Metropolitan Police Department is not here at the present time, ladies and gentlemen. Do you know one Officer Patricia M. Godwin of the Women's Bureau of the Metropolitan Police Department?

(No response.)

MR. NUNZIO: Officer George R. Wesley.

(Prospective witness stood.)

MR. NUNZIO: You are presently assigned, sir, to what division of the Metropolitan Police Department?

WITNESS WESLEY: Criminal Investigation Division.

MR. NUNZIO: Do any of you know Officer Wesley?

JUROR DEYO: Boyd Deyo. I know Officer Wesley.

MR. NUNZIO: In what way do you know Officer Wesley?

JUROR DEYO: He is a friend of my brother-in-law. I have met him before.

MR. NUNZIO: In view of this knowledge, having met the police officer, would this in any way prejudice your opinion for or against the defendant if you were selected as a juror in this case?

JUROR DEYO: No, it would not.

A JUROR: This Dr. Chin, does he have his office on Sixth Street, Northwest?

MR. NUNZIO: I don't know, ma'am. All I have is D.C. General Hospital.

What is your name, ma'am?

JUROR HANSBOROUGH: Helen Hansborough.

MR. NUNZIO: Let me ask you this, Mrs. Hansborough, in view of the fact this may be the same Dr. Chin, do you know him as a friend or as a patient.

JUROR HANSBOROUGH: A patient.

MR. NUNZIO: Would this in any way prejudice your opinion either for or against the defendant, knowing a doctor in the case, if you were selected as a juror in this case?

JUROR HANSBOROUGH: No, it would not.

MR. NUNZIO: Thank you, Mrs. Hansborough.

Officer Melvin Cass.

(Prospective witness stood.)

MR. NUNZIO: To what division are your presently assigned, sir?

WITNESS CASS: Criminal Investigation Division.

MR. NUNZIO: Do any of you know Officer Melvin Cass of the Criminal Investigation Division, Metropolitan Police Department?

(No response.)

MR. NUNZIO: I take it by your silence you do not.

Officer Ned Upright is not presently here, ladies and gentlemen. He is also a member of the Metropolitan Police Department. He lives in Oxon Hill, Maryland.

Do any of you know a person by the name of Ned L. Upright?

(No response.)

MR. NUNZIO: Again, I take it by your silence that you do not.

Robert F. DeMilt, detective formery with the Sex Squad, now with a precinct.

(Prospective witness stood.)

MR. NUNZIO: You are now with what precinct, Officer DeMilt?

WITNESS DeMILT: Seventh Precinct.

MR. NUNZIO: Do any of you, ladies and gentlemen, know Officer Robert F. DeMilt?

(No response.)

MR. NUNZIO: I take it by your silence you do not.

Your indulgence, Your Honor.

(Counsel conferred privately with the witness.)

MR. NUNZIO: Ladies and gentlemen, I would like to get my terminology straight. The man has earned the respect of detective. I understand all the officers sitting over there are detectives. With due respect to them, I introduced them as officers instead of detectives, as well as Detective Cass.

Detective Roy A. Perry, would you please stand?

(Prospective witness stood.)

MR. NUNZIO: What division are you with, Detective?

WITNESS PERRY: Criminal Investigation Division, Sex Squad.

MR. NUNZIO: Do any of you know Detective Robert A. Perry?

(No response.)

MR. NUNZIO: Again, I take it by your silence that you do not.

To facilitate it, ladies and gentlemen, let me read through the remaining list. They are all police officers. If you do know any of them, at the conclusion of the list, I will give you an opportunity to respond.

Joyce Plath, member of the Women's Bureau, Metropolitan Police Department, lives in West Hyattsville, Maryland.

Detective Paul W. Chesser. He is not here at the present time, Metropolitan Police Department, lives in Takoma Park, Maryland.

Those would be the remaining two police officers. Do any of you know the police officers just mentioned?

(No response.)

MR. NUNZIO: I take it by your silence that you do not.

Also in support of its case, the Government may or may not call the following agents from the Federal Bureau of Investigation:

Mr. Allison C. Semmes with the F.B.I. and lives in Bethesda, Maryland.

Robert E. Neill, Special Agent with the Federal Bureau of Investigation.

Mr. Thomas F. Kelleher, Jr., resides in Springfield, Virginia, a special agent of the F.B.I.

Mr. Frederick L. Edwards resides in Springfield, Virginia, a special agent of the F.B.I.

Do any of the prospective panel members know any of the Federal Agents that I have identified to you rather briefly?

JUROR AYRES: Martha Ayres.

MR. NUNZIO: Yes, Miss Ayres.

JUROR AYRES: I know Mr. Semmes, and I know the names of some of the other agents.

MR. NUNZIO: Are you employed by the Federal Bureau of Investigation?

JUROR AYRES: Yes, I am.

MR. NUNZIO: Do you know them personally or just in a working capacity?

JUROR AYRES: I know them from seeing them in the hall, just saying Hello.

MR. NUNZIO: Knowing these individuals, would this prejudice your opinion either for or against the defendant in view of the fact these witnesses may be called on behalf of the Government?

JUROR AYRES: No, it wouldn't.

MR. NUNZIO: Thank you very much.

In view of what Mrs. Ayres has stated, ladies and gentlemen, are any of you presently employed or have been employed by a law enforcement agency, either the Federal Government or District Government, the Internal Revenue, Justice Department, United States Attorney's Office, the Corporation Counsel's Office, or do you have any member of your family with the Metropolitan Police Department or yourself a member or past member of the Metropolitan Police Department?

(No response.)

MR. NUNZIO: Mrs. Ayres, are you presently employed by the F.B.I.?

JUROR AYRES: Yes, I am.

MR. NUNZIO: And more specifically, what section?

JUROR AYRES: Personnel section.

MR. NUNZIO: Thank you.

Are any members of your immediate family or close relatives employed by a law-enforcement agency?

(No response.)

MR. NUNZIO: Again, I take it by your silence you have no relatives employed by a law-enforcement agency.

Do any of you have any immediate family members or close relatives that have been employed by a law-enforcement agency?

JUROR HOLLOWAY: William Holloway.

MR. NUNZIO: Yes, Mr. Holloway.

JUROR HOLLOWAY: My niece's husband just resigned from the Police Department.

MR. NUNZIO: Your niece's husband was a former member of the Metropolitan Police Department?

JUROR HOLLOWAY: Yes.

MR. NUNZIO: Would this in any way prejudice your opinion, in view of the fact you have had a relative who was a member of the Police Department?

JUROR HOLLOWAY: No, sir.

MR. NUNZIO: Thank you, sir.

Ladies and gentlemen, this is a capital case. The Government is not asking for the death penalty in this case, however, if you will listen to the question closely. My attempt is to question the jury concerning, number one, are you opposed to capital punishment? If you are opposed to capital punishment, would this preclude or prevent you from returning a verdict of guilty if the evidence so showed guilt if you were selected as a member of the panel to try this case?

Let me repeat it: I am not asking you whether you are for or against capital; the question is if you are against capital punishment, would this prevent you from returning a verdict of guilty if you were selected as a juror in this case?

The reason I ask the question is because the Court at the end of the case will instruct you that you can return a verdict of guilty with the recommendation of the death penalty.

My question is whether this would prevent you from returning a verdict of guilty, assuming that you are against capital punishment, and that this would prevent you from

returning a verdict of guilty and guilty alone? Is there any such juror present?

JUROR LYLES: Mrs. Johnnie M. Lyles.

MR. NUNZIO: Yes, Mrs. Lyles.

JUROR LYLES: Yes, it would if I thought the penalty would be death.

MR. NUNZIO: If the jury could not decide on the penalty, ma'am, though but just as to the guilt or innocence, would this still prevent you from returning a verdict of guilty?

JUROR LYLES: Yes, it would.

MR. NUNZIO: Would you spell your last name, please?

JUROR LYLES: L y l e s.

THE COURT: No. 111.

MR. NUNZIO: Are there any other jurors who feel they could not return a verdict of guilty if the evidence showed the defendant to be guilty?

(No response.)

MR. NUNZIO: So that there is no misunderstanding, I am not concerned about your attitude towards capital punishment but I am concerned about a juror who would take the jury box with this attitude, that your opposition to capital punishment would prevent you from returning a verdict of guilty if the evidence showed the defendant to be guilty.

Yes, Mrs. Lyles.

JUROR LYLES: You say if I felt that he was guilty, would I say not guilty if I thought he would get the death penalty?

MR. NUNZIO: That is correct.

JUROR LYLES: Yes, that is what I said.

MR. NUNZIO: I think Mrs. Lyles put it rather briefly but correctly, ladies and gentlemen, the essence of the question.

In view of the nature of the offense, ladies and gentlemen, is there any member of the prospective panel that would prefer not to sit and hear and judge this type of case? It is a rape case.

(A juror stood.)

MR. NUNZIO: Would you state your name, please?

JUROR LYONS: Mrs. Mildred Lyons.

MR. NUNZIO: Yes ma'am. How do you spell your name?

JUROR LYONS: L y o n s.

MR. NUNZIO: Thank you, ma'am.

Does any reason suggest itself to any member of the prospective panel why you feel you could not sit and try this case fairly and impartially?

(No response.)

MR. NUNZIO: I take it from your silence that no reason suggests itself to you, that you feel you could sit and try this case.

Are any of you graduates of any law school or have you had any law training?

(No response.)

MR. NUNZIO: I take it by your silence we have no lawyers in the prospective panel, nor any students of a law school in the past.

Nothing further, Your Honor.

THE COURT: Mr. Ianni.

MR. IANNI: May it please the Court and you, ladies and gentlemen of the prospective panel, my name is Samuel Ianni. I represent Mr. Johnson. I have one or two questions that I would like to ask of you.

Have any of you, either yourselves or a close relative—and by "a close relative," I mean a wife, a sister, a daughter—have any of you been the victim of a rape?

(A juror stood.)

MR. IANNI: What is your name, ma'am?

JUROR THOMPSON: Florence E. Thompson.

MR. NUNZIO: May we approach the Bench, Your Honor?

THE COURT: Yes, come to the Bench.

(At the Bench:)

MR. NUNZIO: I call for this so that if further questions are asked, they be asked at the Bench not to embarrass the juror.

THE COURT: If you go any further, bring them up here.

MR. IANNI: I am not going to go any further.

THE COURT: It is embarrassing for them to have to answer certain questions in front of other people.

MR. NUNZIO: I have no objection to the question. It is just that more might be embarrassing.

THE COURT: I understand.

MR. IANNI: I am not going to ask anything more on that.

(In Open Court:)

MR. IANNI: Miss Bertha M. Hill: Is Miss Bertha H. Hill present?

JUROR HILL: Yes.

MR. IANNI: I notice in the occupations listed on the master list that you are unemployed at the present time. Is that correct?

JUROR HILL: Yes.

MR. IANNI: What was your occupation when you were working?

JUROR HILL: What was my occupation?

MR. IANNI: Yes.

JUROR HILL: I was working at a steam table.

MR. IANNI: That is in a dry cleaning business, is that it?

JUROR HILL: No, a cafeteria.

MR. IANNI: Thank you.

Mr. Boyd Deyo, could you tell me again what the relationship is between you and the officer that you stated you knew?

JUROR DEYO: He is a friend of my brother-in-law's. I have met him. That is the extent of my relationship with him.

MR. IANNI: He is more a friend of your brother-in-law than yours?

JUROR DEYO: That is true.

MR. IANNI: Do you know on how many occasions you met him?

JUROR DEYO: Maybe two or three.

MR. IANNI: But your brother-in-law is not a police officer?

JUROR DEYO: No.

MR. IANNI: Ladies and gentlemen, we may call as witnesses any one or all of these persons, none of whom are present in the courtroom at the present time:

Robert Jones who lives at 619 Orleans Place, Northeast.

Eugene Kiser, 604 Orleans Place, Northeast.

Barrington Henry, who is the proprietor and owner of a business that uses the trade name of Henry Fuel Company which is located at 4640 Minnesota Avenue, Northeast; and an Arthur Cox who also works for Henry Fuel Company at that same address.

Blanche K. Tyndle, who was the wife of Mr. Johnson at the time of this occurrence.

Do any of you any of these persons that I have just named?

(A juror stood.)

MR. IANNI: Will you give us your name, please?

JUROR DeBRUHL: Melvin DeBruhl.

MR. IANNI: Whom do you know, sir?

JUROR DeBRUHL: I know Mr. Barrington Henry very well.

MR. IANNI: Would this in any way prejudice your decision in this case, the fact that you know Mr. Henry?

JUROR DeBRUHL: No, it wouldn't.

MR. IANNI: Thank you.

I take it by the silence of the remaining jurors that your answer as to whether you do know any of those people I have named is in the negative.

I have nothing further, Your Honor.

THE COURT: May I ask counsel to approach the Bench.

(At the Bench:)

THE COURT: Are there any motions to strike for cause?

MR. NUNZIO: I have none, Your Honor.

MR. IANNI: I would move to strike Mrs. Thompson, which is No. 150.

THE COURT: Of course, we didn't ask her any questions.

MR. NUNZIO: I would move to strike Mrs. Lyles.

THE COURT: Yes, she can't comply with the Court's instructions.

Mrs. Lyles, we will strike her.

MR. IANNI: Yes.

THE COURT: Mrs. Thompson, we didn't ask any. Off hand I think we ought to strike her. I don't want to continue the questioning.

MR. NUNZIO: I think it would further embarrass her.

THE COURT: All right. We will strike No. 111 and No. 150, Mrs. Thompson.

We will let them sit in the panel. Just pass over them when you seat the jurors.

MR. NUNZIO: Mrs. Lyons said she would prefer not to sit in this type of case.

MR. IANNI: Mildred L. Lyons, No. 113. I would ask to strike her for cause.

THE COURT: Any objection?

MR. NUNZIO: No objection.

THE COURT: We will strike No. 113.

Let them all sit here but don't call them, pass over them when you call the jury.

(In Open Court:)

THE DEPUTY CLERK: Jurors will please answer to their names and take a seat in the jury box as designated by the marshal.

Andrew Nathan.

THE DEPUTY MARSHAL: No. 1.

THE DEPUTY CLERK: Mrs. Leola Mahan.

THE DEPUTY MARSHAL: No. 2.

THE DEPUTY CLERK: Mrs. Hazel Courm.

THE DEPUTY MARSHAL: No. 3.

THE DEPUTY CLERK: Mrs. Stella Cossey.

THE DEPUTY MARSHAL: No. 4.

THE DEPUTY CLERK: Mrs. Beatrice Shepherd.

THE DEPUTY MARSHAL: No. 5.

THE DEPUTY CLERK: Mrs. Mae Minor.

THE DEPUTY MARSHAL: No. 6.

THE DEPUTY CLERK: Miss Helen Hansborough.

THE DEPUTY MARSHAL: No. 7.

THE DEPUTY CLERK: Albert Huntley.

THE DEPUTY MARSHAL: No. 8.

THE DEPUTY CLERK: Mrs. Kathlyne Olsen.

THE DEPUTY MARSHAL: No. 9.

THE DEPUTY CLERK: Boyd Deyo.

THE DEPUTY MARSHAL: No. 10.

THE DEPUTY CLERK: Mrs. Sally Curry.

THE DEPUTY MARSHAL: No. 11.

THE DEPUTY CLERK: Reese Simmons.

THE DEPUTY MARSHAL: No. 12.

MR. NUNZIO: No. 8.

THE DEPUTY CLERK: Albert Huntley, you are excused to return to the jury lounge. Mrs. Nina Swann, please take seat No. 8.

MR. IANNI: Miss Helen Hansborough, No. 7.

THE DEPUTY CLERK: Miss Hansborough, your are excused to return to the jury lounge. Mrs. Pearl Samons, please take seat No. 7.

MR. NUNZIO: No. 1, please.

THE DEPUTY CLERK: Andrew Nathan, you are excused to return to the jury lounge; and Miss Martha Ayres, please take seat No. 1.

MR. IANNI: No. 1.

THE DEPUTY CLERK: Miss Martha Ayres, you are excused to return to the jury lounge and Norvel Lee, please take seat No. 1 in the jury box.

MR. NUNZIO: No. 1, Mr. Lee.

THE DEPUTY CLERK: Mr. Norvel Lee, you are excused to return to the jury lounge, and David Frank, please take seat No. 1.

MR. IANNI: No. 1.

THE DEPUTY CLERK: Mr. Frank, you are excused to return to the jury lounge, and Mrs. Dorothy Roberts, please take seat No. 1.

MR. NUNZIO: No. 12.

THE DEPUTY CLERK: Mr. Reese Simmons, you are excused to return to the jury lounge; and Phillip Joram, please take seat No. 12.

MR. IANNI: Satisfied.

MR. NUNZIO: The Government is satisfied.

THE COURT: Very well.

Will you swear the jury, please.

(Whereupon, a jury of twelve members was duly sworn.)

THE COURT: Could I ask counsel to approach the Bench, please.

(At the Bench.)

THE COURT: What is your sense of timing? How many alternates do we need? This is the flu season.

MR. IANNI: I am not going to take very long at all.

THE COURT: Will two alternates get us by?

MR. NENNO: I think so. I have never lost more than two jurors.

THE COURT: Do you think it will go more than a day or so?

MR. NENNO: It should go into Friday, Your Honor. I can't rush it.

THE COURT: I think two alternates should be sufficient.

MR. IANNI: I think so, Your Honor.

THE COURT: If not, we can agree to go ahead with a truncated jury.

(In Open Court.)

THE DEPUTY CLERK: Niles B. Austin.

THE DEPUTY MARSHAL: Alternate No. 1.

THE DEPUTY CLERK: Miss Mary Reid.

THE DEPUTY MARSHAL: Alternate No. 2.

MR. NENNO: Strike Alternate No. 1, please.

THE DEPUTY CLERK: Mr. Niles Austin, you are excused to return to the jury lounge, and Mrs. Christine Murgia, please take seat Alternate No. 1.

MR. IANNI: Alternate No. 1.

THE DEPUTY CLERK: Mrs. Christine Murgia, you are excused to return to the jury lounge; and Mrs. Maude Hughes, please take seat Alternate No. 1.

THE COURT: That exhausts the challenges, gentlemen. Will you swear the alternate jurors, please.

(Whereupon, the alternate jurors were duly sworn.)

THE DEPUTY CLERK: The remaining jurors are excused to return to the jury lounge.

THE COURT: Could I ask counsel to come to the Bench again for a moment.

(At the Bench:)

THE COURT: I have another jury out. I just got word they are ready to bring in a verdict, so I am going to take a few minutes out and take the verdict before we start this case.

MR. FANNI: Yes, Your Honor, I request a rule on the witnesses.

THE COURT: Surely.

(In Open Court:)

THE COURT: Ladies and gentlemen of the jury, before we get into the formal presentation of the case, we are going to take a short recess.

Would you follow the marshal to the jury room.

(Whereupon at 2:28 p.m., a recess was taken.)

## OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

MR. NENZIO: May it please the Court, ladies and gentlemen of the jury, the case that you are about to hear is the United States of America versus Barrington Joseph Johnson.

Mr. Johnson is charged with a violation of the District of Columbia Code, Title 22, Section 2801; which is rape.

The Grand Jury charges that on or about January 22, 1967, within the District of Columbia, Barrington Joseph Johnson had carnal knowledge of a female named Luella E. Mayes, forcefully and against her will.

This is not evidence in the case, ladies and gentlemen of the jury; it is the administrative process whereby the case ultimately becomes before you; the triers of the facts.

Now, although this is not evidence in the case, it sets forth the charge. It apprises the defendant exactly what he is charged with. The Government intends to prove beyond a reasonable doubt this indictment.

In support of the indictment, the evidence will show through the testimony of witnesses that on the 22nd of January, 1967, Mrs. Luella Mayes was employed at St. Elizabeths Hospital and had been, for some time, as the evidence will show; that she had left home early that

morning, sometime before 6:00 o'clock, to go to work at the hospital where she was in a training program there, a nurse's training program; that there came a time that her automobile stalled.

She attempted to call her husband. She was near a gas station. While talking to her husband over the telephone and in the general area of the gas station, she was approached by an individual who was later identified to be the defendant in this case, Mr. Barrington Joseph Johnson, who volunteered his services to push her car.

The complainant was advised by the service station attendant that she had a dead battery. She accepted this push. The defendant got behind her car and proceeded to push.

At that time, the evidence will show, he was driving a white Ford. I think the evidence will show it was of 1960 vintage; that there came a time that the defendant ceased to push the complainant's car when they were on the grounds of the hospital, and another car was parking at that hour of the morning—it being dark—the evidence will show. He momentarily stopped until this other car had finished parking, and then proceeded to push the complainant's car into the parking area.

The evidence will further show that there then came a time that the defendant went to the complainant's car, attempted to get in. He could not get in because of the structural set-up of the automobile and he proceeded to pull the complainant out of her vehicle.

He pulled her out of her vehicle and then took her to his automobile. He put her into his automobile and proceeded to drive away. She was asking him at that time to let her go back to work.

The evidence will show she didn't even know this man on that occasion.

The evidence will further show that there came a time that he stopped to get some gas. Gas was put into the defendant's car but at the time that he was getting gas for his car, he had his arm around her neck.

The evidence will show he had threatened her not to make a sound while they were there.

The evidence will further show that after he got the gas, he then left the scene of this gas station, proceeded

to drive around; that there then came a time that he was in the general area, I believe, of the Douglas School which is located in the District of Columbia, in the Southeast section of the city. He talked to her, questioned her, told her to take off her things.

There then came a time, the evidence will show, that she was in fear of her life. She then took off her under garments. These items will be identified for you as to exactly what she took off.

The evidence will show that he then had sexual intercourse with her against her will, at the threat of force, threat of bodily harm and that she was in fear. In other words, forceably and against her will, and a fear she capitulated.

The evidence will further show that she was then directed to put her things back on and on the way back to the hospital—and he took her back to the hospital—they had a conversation. She had asked to be taken back to work.

The conversation will show that he talked about the police, would she call him, he would like to see her again. There then came a time that he entered the hospital grounds. He told a name where he had worked, as the evidence will show.

When she got out of the car, he told her not to turn around and look at the tags.

The evidence will further show that when she got into the hospital, she reported it immediately and the police were notified. Detectives from the Sex Squad appeared. The complainant was taken to the Sex Squad and the evidence will show she was taken to the hospital and she was examined. The things of her clothing were taken from her.

The evidence will show these items of clothing were shipped to the F.B.I.

But the evidence will further show that during the time that the complainant was going back to the hospital with the defendant, he had made mention about returning back at 3:00 o'clock except that he thought the police would be there. Would she call the police? And she said, "No."

Sometime before 3:00 o'clock on the same date, the evidence will show that a 1960 Ford meeting the description of

the one the complainant had given to the police, and others had given to the police, was seen on the hospital grounds.

The evidence will further show the police were notified as a result of seeing this vehicle on the grounds. The police were on the scene approximately at 3:00 o'clock that afternoon. The defendant was observed in his automobile in a very relaxed position in the car, almost out of sight; and that the defendant was subsequently arrested on the hospital grounds.

He was identified on the grounds by the complaining witness in this case, Mrs. Mayes.

The evidence will further show that at the time he was arrested, he had in his possession the complainant's car keys and there was a conversation that the defendant had with the complainant when he was taking her back to the hospital and he refused to give her back her car keys.

The evidence will further show that these keys were found at the time of the defendant's arrest on the defendant.

The evidence will further show that a pair of gloves that the complainant had that morning was found in the defendant's car at 3:00 o'clock that afternoon.

In other words, the Government intends to prove beyond a reasonable doubt that Mr. Barrington Joseph Johnson had carnal knowledge of a female named Luella E. Mayes forcefully and against her will on January the 22nd, 1967.

I ask you to pay attention to the case. It is a most important case for all parties concerned.

I am quite confident that at the conclusion of the trial, the Government will have proved that this defendant is guilty as charged.

Thank you.

THE COURT: Mr. Ianni.

MR. IANNI: The defense will reserve its opening statement, Your Honor.

THE COURT: Very well.

Will you call your first witness, Mr. Nunzio.

MR. NUNZIO: Call Mrs. Mayes, please.

Whereupon,

## LUELLA ESSIE MAYES,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

### DIRECT EXAMINATION

BY MR. NUNZIO:

Q If you will, Mrs. Mayes, speak into the microphone. Speak slowly and distinctly so that we have no difficulty understanding you.

Would you state your full name, please?

A Luella Essie Mayes.

Q Where do you live, Mrs. Mayes?

A 4304 12th Street, S.E.

Q Are you employed, Ma'am?

A Yes, at St. Elizabeths Hospital.

Q And in what capacity are you employed at the hospital, Mrs. Mayes?

A Nursing Assistant.

Q How long have you been an employee of St. Elizabeths Hospital?

A Since 1959.

Q In January of 1967, in what capacity were you employed at the hospital?

A I was in nursing. I had just changed over from food service and I was going to classes.

MR. IANNI: Your Honor, I am sorry, I didn't get that answer.

THE COURT: Would you read the answer, please.

(The last answer was read by the reporter.)

BY MR. NUNZIO:

Q In other words, you were in training on January 22, 1967, is that correct?

A Yes, I was.

Q You are married, is that correct?

A Yes.

Q Do you have any children?

A I have three children.

Q What are the ages of your children, Mrs. Mayes?

A Sixteen, thirteen and nine.

Q Mrs. Mayes, I want to direct your attention to Sunday, the 22nd of January, 1967. Were you working on that date?

A Yes, I was.

Q What were your duty hours at the hospital on the 22nd of January, 1967?

A I was working 7:00 to 3:30.

Q And in what ward were you working at that time, that is, on the 22nd of January 1967, at the hospital?

A Geriatrics C in the Geriatrics Building.

Q Did you leave for work on the morning of the 22nd of January, 1967?

A Yes, I left home a few minutes after 6:00.

Q And what means of transportation did you use to get to the hospital?

A I was driving my car.

Q And what type of car was that?

A A 1966 Ford.

Q Would you give us the color of the car, please?

A It's a rust color.

Q Rust color.

Was it light or dark out at the time when you left the house to go to work that morning?

A It was dark.

Q Would you tell us the route that you took to get to the hospital that morning?

A Well, I always come down Wheeler Road and Alabama Avenue, and go out 7th or 8th Street to Nichols Avenue.

Q Did anything happen to the vehicle that you were driving on that morning?

A On that morning, I came out Lebaux Street and my car cut off right at Nichols and Lebaux, right at the stop sign.

Q As a result of this cut off of your automobile, what, if anything, did you do at that time, Mrs. Mayes?

A Well, it's a service station there and I could see the attendant sitting in the station. I went over and asked him if he could start my car, and while he went over to see if he could start it, I went in the phone booth to call my husband and told him that the car had stopped.

Q Now, was he able to start your car?

A No, he couldn't. The service station attendant came back and told me that, apparently, I had a dead battery.

I was still talking to my husband on the phone at the time. The car had did this the morning before and it had started with a push.

Q Now, what if anything happened at the time when you were talkng to your husband concerning the car?

A Well, a white Ford pulled into the service station at the time and the fellow got out and came over to the phone booth and asked me what was wrong. And I told him my car had stopped. He asked me how far I had to go and I said to St. E's. He said he would push my car onto the grounds.

Q You were still on the phone talking with your husband, is that correct?

A Yes.

Q Was this person talking to you at the door of the phone booth or near the phone?

A Yes, right at the phone booth.

Q Now, did you tell your husband the conversation you had with this individual?

A Yes, I did.

Q What did your husband advise you to do at that time with this other person present?

A He told me to let him push it on the grounds and maybe he would come up to see if he could start it later, or maybe it would start in the evening by itself.

Q Now, what if anything did you do, or what if anything happened after you put the phone back on the hook?

A Well, I went over and I got in my car and the fellow turned his car around and came up behind my car and started to push me to St. E's.

Q All right. Now, there came a time when you got to the hospital grounds, is that correct?

A Yes.

Q What, if anything, happened when you got to the hospital grounds?

A Well, we had just about reached the parking lot and—

Q What parking lot would that be, Mrs. Mayes?

A This is the Geriatrics parking lot.

Q All right. Please continue.

A Well, he stopped pushing me so I put my car window down and I asked him was this as far as he was going to push me. And he said, no, there was another car that was parking on the lot and he said the lights were blinding him. So, whoever it was, they got out of their car and went into the building and he proceeded to push me into the parking space.

Q What if anything happened after you got into the parking space of the Geriatrics Ward at St. Elizabeths Hospital?

A Well, I cut my car lights off and I started to get out of my car and he opened the door and pushed me back in my car and he told me to move over. I told him I couldn't because my car has a console in it and—

Q That is a divider in between the seats in the front?

A Yes.

Q All right. Please continue.

A And he then pulled me out of my car and put me in his car on the driver's side, and he slid in right beside me.

Q Did he say anything at this time to you when he was taking you out of your car and pushing you into his car, if you know?

A I don't remember.

Q All right.

What, if anything, happened after you got into this man's automobile?

A Well, after he put me in his car, he drove back out the gate onto Nichols Avenue and he said that he knew I was scared because I was so nervous.

I told him I had a thyroid condition and this made me nervous anyway.

He went down Nichols Avenue all the way down to—

there's a stop light down at the bottom of the hill, and he went into the service station to get gas.

He told me while we were riding down Nichols Avenue that he was not going to hurt me. He kept telling me this, that he was not going to hurt me if I didn't scream.

He went into the service station and when he went into the station, he put him arm back around my neck.

Q You say he went into the service station. Did he physically get out of the automobile?

A No, he drove into the station.

Q All right. What happened when you got to the service station?

A The man came over to the car and he asked for gas and he paid him, still with his arm around my neck.

Q Did he say anything to you prior to putting his arm around your neck?

A All he said when he went into the station was for me not to scream, that's all.

Q Approximately how long were you in the station getting gas, if you know?

A I really don't know.

Q All right.

What, if any else, happened after gas had been put into the automobile?

A Well, after he got the gas, he reached into his pocket and he paid the man and he drove out of the service station.

I told the police I thought it was—I wasn't sure what street this was, it might have been Douglas Road or something around there. I am not sure.

Q All right.

What, if anything else, happened then?

A He was just driving and talking, and I remember passing the Stanton Garden Apartments. I knew I was in the vicinity of Douglas School because I know where the Stanton Garden Apartments are.

And he drove into the street where there are no houses or apartments on the street. It was a deserted street.

Q You say there were no houses on this street, no apartments?

A No.

Q Were there any vehicles parked nearby, Mrs. Mayes?

A No, I didn't see any cars parked at all.

Q What, if anything, happened when you got to this deserted street?

A When we got to the street, he cut the car off and he told me there was no use in screaming because no one would hear me.

Q He said this to you?

A Yes, he did.

He then asked me if I was married and I said, "Yes."

And he asked me did I have any children. And I said, "Three."

Then he said, "I bet you love your husband, don't you, don't you?"—like that, and I said, "No."

And he kept talking and he started to reach for me.

He said, "I told you to take your under clothes off."

So, when he started to reach for me, I told him that I would do it.

And I then removed my stockings, my girdle and my pants.

Q At the time he started to reach for you, would you tell us your emotional feeling at that time with respect to the circumstances?

A Well, during the whole time, I was scared to death because I really thought he was going to kill me. I never thought he would take me back to work.

Q Now, you removed what items of clothing at that time?

A My stockings, my girdle and my pants.

Q Did he have sexual relations with you at this time?

A Yes, he did.

Q Did he reach an ejaculation?

A I'm sure he did.

Q You are a married woman and you know what the sexual intercourse act is, is that correct?

A Yes.

Q Did he in fact have sexual intercourse with you?

A Yes, he did.

Q Where did the sexual act take place, ma'am?

A On the front seat in the car.

Q Prior to the time the defendant engaged in this sexual act with you, what, if anything, did he do, if you know?

A He had a jacket on. He took his jacket off and put it on the back seat of the car.

Q Do you know how the defendant was dressed, if you know?

A All I could remember at the time was that he had on dark pants. I thought the pants were corduroy, I wasn't sure, but I knew they were dark pants. And I thought he had on a dark shirt and he had on some type of fuzzy sweater. I couldn't exactly tell what color it was.

Q After he had had sexual intercourse with you, did he say anything to you at that time?

A You mean during the time of the relationship?

Q If he said anything at all during the sexual relation act or if he said anything after the sexual act?

A Well, during the time, I said something because I could hear cars. They sounded like they were so near to us and I kept telling him that I could hear cars and I thought the police was coming.

Q Would you explain to the jury why you said this to him?

A I don't know. I really thought, you know, that cars were on the street that we were on.

Q What did he say at this time?

A Well, he pulled the window down and he said he could see out of the car window and there were no cars on the street.

Q Did he say anything else?

A He told me if I would act like I wanted him, he would that hurry up and finish and take me back to work.

Q After the sexual act was completed, what, if anything else was said? What, if anything else, did you do, or did he do?

A Well, it was getting lighter and lighter at this time, and he got up and he told me that he had messed his pants

up. And he told me to put my under clothes back on and he was going to take me back to work, and he slid over in the car and he drove back to Nichols Avenue and back up Nichols Avenue. Going up Nichols Avenue, he said to me that he guessed he would never see me again.

And he said he would come back up to St. E's at 3:00 o'clock to start my car for me but I would probably have policemen everywhere and I said, No, I wouldn't.

He drove up Nichols Avenue and he took me in the first gate on the left which was not the gate he came out of. If you don't know St. Elizabeths, you don't know the grounds or where you are going. He took me back in another gate.

Q In other words, he took you in by way of another gate other than the gate you left from?

A Yes, he did.

Q Did he state his name at any time while he was in the car returning you back to the hospital?

A When we went in the gate, he asked me for my car keys. I took my keys out of my pocketbook and took my car key off of my ring and gave him the key. He insisted that I had the wrong key. I told him I didn't. And then I asked him would he give me my car key back because my husband might come up during the day to try to start the car, and he told me to tell him that my keys were in my locker or something, that I couldn't find them or I couldn't get them.

And he asked me for an envelope or a piece of paper or something. I took a piece of paper out of my pocketbook and he wrote the name "Charles" on the piece of paper. I don't know if No. 11 has it, and a phone number.

Q He wrote a phone number on a piece of paper and the name Charles?

A Yes, he did.

Q Did he tell you that was his name?

A Yes, he did, and he asked me what was my name and I said, "Luella."

Q Was there any discussion as to place of employment?

A Yes. This was when we were riding around after he left the service station. I think this is when he was telling me about—he told me that he worked for Safeway, that he

drove a truck for Safeway and that—I don't remember just when he told me this, but I know he did—that he drove a truck for Safeway and that he lived in the Southeast area, that he lived on Atlantic Street; and he had seen me before and he knew I lived in Southeast. This is all he said about working.

Q Did you in fact live in Southeast on January 22nd, 1967?

A Yes, I did.

Q Now, was there any other conversation with this individual on your way back to the hospital, if you can recall?

A I don't recall anything except for the car keys.

Q All right. Did there come a time when you actually got to the hospital grounds?

A Yes, we went into the gate and he proceeded to take me right around to the building where I worked, to the side door of the building. And when he got around to the side door of the building, he told me to get out of the car and walk in the building and not to try to get his tag number, that it was not his car anyway, he borrowed it.

I walked in the building, and when I got in the building I looked back and he was still sitting there and I went into the supervisor's office and told her what had happened.

Q You reported what had transpired to the supervisor at that time?

A Yes, I did.

Q Who, if anyone else, did you report it to at that time?

A Well, at this time she called the head nurse that is on the ground in charge of all the buildings and she called the guards, and the guards came over. After they found out what had happened, the night physician came in and he said that since this had happened off the grounds, it would have to be reported to No. 11 Precinct. And one of the guards called No. 11.

Q You were present at the time the police were called?

A Yes. And No. 11 called the Sex Squad.

Q Did the police respond to this call?

A Yes, they did.

Q Approximately what time was it, if you know, when the police responded?

A I don't know what time it was.

Q Now, when the police came, did you talk to the police about this?

A Yes, I told them what had happened.

Q What, if anything else, did you do after you had explained what had happened to the police?

A I was taken to the Sex Squad and I had to give a statement there to the sergeant. I don't know his name and then the Sex Squad took me to D.C. General Hospital where I was examined; and from there, I went home.

Q You were examined, is that correct, at the hospital?

A Yes.

Q Did your have occasion to see this same individual that had raped you on the morning of January 22nd, the same day?

A Yes, I did.

Q When was that, Mrs. Mayes?

A This was in the evening, around 3:00 or 10 after 3:00. No. 11 Precinct came up to my house and told me that the guard

MR. IANNI: Objection.

BY MR. NUNZIO:

Q Well, somebody came to your house, is that correct?

A Yes.

Q As a result of this conversation, were you taken anywhere?

A I was taken back to the grounds to see if I could identify a car on the grounds.

Q Did you see a car on the grounds that you could identify?

A Yes. It was a white Ford Falcon, about a couple of lanes down from my car.

Q Who, if anyone, was inside that car, Mrs. Mayes?

A The man was in the car that raped me that morning.

Q Was he sitting up in the car at the time that you approached the vehicle?

A I couldn't see him when I approached the vehicle.

Q When this person did finally come out of the vehicle, what part of the vehicle did he come out of, the front seat or the back seat, if you know?

A One of the policemen opened the door and made him get out.

Q You were present at the time that he made him get out?

A Yes, I was.

Q What part of the vehicle did he get out from?

A The front seat.

And one

MR. IANNI: Objection, there is no question pending.

THE COURT: There is no question pending. Don't volunteer anything.

BY MR. NUNZIO:

Q Do you see the person that you saw on the morning of January 22nd, the person that raped you, in the courtroom today

THE COURT: Just a moment, Mr. Nunzio.

MR. NUNZIO: Yes, Your Honor.

THE COURT: That is the second time you have characterized these activities. This is for the jury to determine, not for you to characterize. This is a jury question.

MR. NUNZIO: All right, Your Honor.

BY MR. NUNZIO:

Q Do you see the person that you saw on the morning of the 22nd of January in court today?

A Yes, I do.

Q All right. Would you identify him for us, please, where he is seated?

A At the table there (indicating).

MR. NUNZIO: May the record show she has identified the defendant in this case, Your Honor?

THE COURT: The record will so indicate.

BY MR. NUNZIO:

Q Did you know the defendant Barrington Joseph Johnson before January the 22nd, 1967?

A No, I did not.

Q Had you ever met him before January the 22nd, 1967?

A No.

Q With respect to the clothing that you were wearing on the morning of January the 22nd, 1967, Mrs. Mayes, what if anything, did you do with that clothing?

A They were taken at the Sex Squad or at the hospital, that is where they were taken.

Q To your knowledge, were they turned over to the police?

A Yes, they said they were.

Q At the time Mr. Johnson was arrested if you know were any items of your clothing in the car that he was sitting in at that time?

A Well, at the time I had lost a pair of gloves

MR. IANNI: Objection, Your Honor.

MR. NUNZIO: Let me just rephrase it, if I may, Your Honor.

BY MR. NUNZIO:

Q Were you present at the time the defendant was arrested?

A Yes, I was.

Q To your knowledge, was anything that you were wearing on the morning of January the 22nd, 1967 did you see anything of yours in the defendant's car at 3:00 o'clock that afternoon?

A Yes.

Q What did you see in his car at that time?

A It was a pair of white dirty leather gloves that I used for driving.

Q Did you see these gloves physically taken from the defendant's car?

A Yes.

Q Now, you testified that you gave the defendant the keys to your car. Did you ever recover those keys to the car?

A When the detective or whoever he was, took the gloves out of the car, he asked him about my car keys.

Q Did you ever see your keys that afternoon?

A Yes. He asked him if he had the key.

Q Did you ever see your keys that afternoon?

A Yes.

Q When you saw those keys, where were they?

A He asked him did he have the keys and he gave them to him.

Q The defendant gave the detective the keys to your car?

A Yes.

MR. NUNZIO: Your Honor, could this item of clothing, the jacket, be marked as Government's Exhibit No. 1 for identification; and may the skirt part of the suit be marked as Government's Exhibit 1-A for identification?

THE DEPUTY CLERK: Government's Exhibits 1 and 1-A marked for identification.

(Beige suit coat and skirt marked Government's Exhibit 1 and 1-A respectively for identification.)

MR. NUNZIO: May this white blouse be marked Government's Exhibit No. 2 for identification?

THE DEPUTY CLERK: Government's Exhibit No. 2 marked for identification.

(White blouse was marked Government's Exhibit No. 2 for identification.)

MR. NUNZIO: If Your Honor please, may this lady's white slip be marked as Government's Exhibit No. 3 for identification?

THE DEPUTY CLERK: Government's Exhibit No. 3 marked for identification.

(Slip was marked Government's Exhibit No. 3 for identification.)

MR. NUNZIO: Your Honor, may this be marked Government's Exhibit No. 4 for identification, one bra?

THE DEPUTY CLERK: Government's Exhibit No. 4 marked for identification.

(Brassiere was marked Government's Exhibit No. 4 for identification.)

MR. NUNZIO: And may this lady's pair of pants, Your Honor, be marked as Government's next exhibit?

THE DEPUTY CLERK: Government's Exhibit No. 5 marked for identification.

(Panties were marked Government's Exhibit No. 5 for identification.)

MR. NUNZIO: And I believe this is classified as a pantie girdle, Your Honor. May this be marked as Government's next exhibit?

THE DEPUTY CLERK: Government's Exhibit No. 6 marked for identification.

(Pantie girdle was marked Government's Exhibit No. 6 for identification.)

THE COURT: Would you come to the Bench a moment, gentlemen?

MR. NUNZIO: Yes, Your Honor.

(AT THE BENCH:)

THE COURT: You practically undressed the woman. Is all this going in evidence?

MR. NUNZIO: Yes, Your Honor. Sperm was found on it, and the bra had hair and fibers on it. The evidence will show the sweater he was wearing had a fuzzy fiber and fibers were found on the bra.

THE COURT: All right. I just couldn't figure out how this is coming in.

MR. IANNI: I am not going to object to any of it, Your Honor.

THE COURT: Very well.

(IN OPEN COURT:)

MR. IANNI: If Your Honor pleases, I will have no objection to them being introduced upon her just identifying that these were her clothes.

THE COURT: Well, let us go through the identification process.

MR. NUNZIO: Yes, Your Honor.

THE COURT: Take them item by item.

MR. NUNZIO: Yes, Your Honor. I intend to.

I think for convenience' sake after the identification, we will just package these things.

BY MR. NUNZIO:

Q I am going to show you these items, Mrs. Mayes. Do you recognize Government's Exhibit No. 3 for identification?

A Yes.

Q Have you ever seen this before?

A Yes.

Q What is it, please?

A It is my white slip.

Q Were you wearing this on the morning of January the 22nd, 1967?

A Yes, I was.

MR. IANNI: No objection to its introduction, Your Honor.

BY MR. NUNZIO:

Q Can you identify the Government's Exhibits 1 and 1 A before you, Mrs. Mayes?

A Yes.

Q What is this, please?

A My suit.

Q When were you wearing this suit, ma'am?

A The same morning.

Q January the 22nd, 1967?

A Yes.

MR. IANNI: No objection to those being admitted, Your Honor.

BY MR. NUNZIO:

Q Would you identify for us, please, if you can, Government's Exhibit No. 4 for identification?

A Yes.

Q What is it, please?

A It is a brassiere.

Q Were you wearing this on the morning of January the 22nd, 1967?

A Yes, I was.

Q Would you identify this for us, please? Tell us what it is. It is marked Government's Exhibit No. 2.

A It is a blouse. It is mine.

Q Were you wearing that on the morning of January the 22nd, 1967?

A Yes, I was.

Q And can you identify these for us, they are marked Government's Exhibit No. 5 for identification?

A Yes. They are panties and they are mine.

Q Were you wearing those on the morning of January the 22nd, 1967?

A Yes, I was.

Q What about the remaining Government's Exhibit No. 6?

A Yes, I was wearing that panty girdle.

Q Is that your panty girdle?

A Yes, it is.

Q Were you wearing that on the morning of January the 22nd, 1967?

A Yes, I was.

Q And these are the same items that you surrendered to the police, is that correct?

A Yes.

MR. IANNI: No objection, Your Honor.

THE COURT: Are you offering them now?

MR. NUNZIO: I wasn't offering them now, Your Honor.

MR. IANNI: Well, it doesn't make any difference. If he wants to offer them, I have no objection.

MR. NUNZIO: I will offer them now, then.

MR. IANNI: No objection.

MR. NUNZIO: The Government would then move into evidence Government's Exhibits Nos. 1 through No. 6.

THE COURT: There being no objection, Government's Exhibits 1, 1A, 2, 3, 4, 5 and 6 for identification will be admitted into evidence.

(Government's Exhibits Nos. 1 through 6 for identification were received in evidence.)

BY MR. NUNZIO:

Q Were you examined by a lady police officer, Mrs. Mayes, while you were at the Sex Squad or at the hospital?

A I was examined at the hospital.

Q To your knowledge, were any pubic hairs taken by the police from you, a lady police, if you recall?

A Yes.

Q Now, Mrs. Hayes, can you tell us, if you do know, approximately what time was it that the defendant returned to the hospital on the morning of January 22nd, 1967? If you do know. If you don't know, just tell us.

A I don't know.

MR. NUNZIO: If Your Honor please, may these gloves be marked as Government's Exhibit No. 7?

THE DEPUTY CLERK: Government's Exhibit No. 7 marked for identification.

(Gloves were marked Government's Exhibit No. 7 for identification.)

BY MR. NUNZIO:

Q Mrs. Mayes, I ask you to take a look at Government's Exhibit No. 7. Can you identify these and tell us what they are, please?

A White gloves. They are mine.

Q They are yours?

A Yes.

Q Are those the gloves that you had on the morning of January the 22nd, 1967?

A Yes.

Q Were these the gloves that were recovered from the defendant's automobile in your presence?

A Yes, they are.

MR. NUNZIO: Your Honor, may this set of keys be marked as Government's Exhibit No. 8?

THE DEPUTY CLERK: Government's Exhibit No. 8 marked for identification.

(Keys were marked Government's Exhibit No. 8 for identification.)

BY MR. NUNZIO:

Q Mrs. Mayes, I show you what has been marked as Government's Exhibit No. 8 for identification. Can you tell us what they are, please? Have you ever seen them before?

A They are my car keys.

Q Did you have these keys on January the 22nd, 1967?

A Yes, I did.

Q Are these the keys that you testified to that you surrendered to the defendant on that morning?

A Yes.

Q Are these the same keys you said you saw recovered from the defendant on the afternoon of January the 22nd, 1967?

A Yes.

MR. NUNZIO: The Court's indulgence, please.

(A short pause in proceedings.)

BY MR. NUNZIO:

Q With respect to that piece of paper, to whom, if anyone, ma'am, did you turn that piece of paper over, the one that had the name "Charles" written on it?

A The police officer.

Q Now, you testified that you had a thyroid condition in January of 1967, is that correct?

A Yes.

Q Has that thyroid condition been corrected in any way?

A I had surgery in April for it.

Q Where did that surgery take place?

A Cafritz Hospital.

Q Is that on the neck part of your body?

A Yes.

Q What effect, if any, did the defendant's arm around your neck have upon that thyroid in January of 1967?

MR. IANNI: I think that is irrelevant, Your Honor.

THE COURT: I don't know whether she can testify to the effect. Are you asking for a medical opinion?

MR. NUNZIO: Let me rephrase the question, Your Honor. Let me withdraw the question.

THE COURT: Let us start with the premise that she cannot testify as a medical expert.

MR. NUNZIO: No. That is not the question, Your Honor. Let me just rephrase it. Perhaps I can clarify it for the sake of the witness as well as the Court.

BY MR. NUNZIO:

Q When he grabbed you around the neck, did it have any effect upon your breathing?

A Yes, because at that time I had not had my thyroid removed and I couldn't stand any pressure on my neck.

The slightest pressure on my neck would affect my breathing.

Q Did it in fact affect your breathing on the date in question, January 22nd, 1967, when he grabbed you around the neck?

A Yes, I had to breathe heavily.

MR. NUNZIO: The Court's indulgence, please.

(Short pause in proceedings.)

BY MR. NUNZIO:

Q With respect to the automobile the defendant was driving, to whom, if anyone, did you describe that automobile after the defendant had dropped you off at the hospital?

A I am not sure if it was the guard or No. 11 the first people I tried to describe it to.

Q Did you tell the police?

A Yes.

Q And everything that you have testified to took place here in the District of Columbia?

A Yes, it did.

MR. NUNZIO: No further questions, Your Honor.

THE COURT: Would counsel come to the Bench a moment.

(AT THE BENCH:)

THE COURT: I assume you are going to have pretty extensive cross-examination?

MR. IANNI: Yes, Your Honor.

THE COURT: I would like to recess then.

MR. NUNZIO: Also, there is a Jencks Act statement involved and I think Mr. Ianni would like to look at the statement.

THE COURT: Look at it overnight and we will have the cross-examination tomorrow morning.

MR. IANNI: Very well, Your Honor.

(IN OPEN COURT:)

THE COURT: Ladies and gentlemen of the jury. I understand that the next phase of this testimony is going

to be rather lengthy, so we are going to recess now until 10:00 o'clock tomorrow morning.

It would be appreciated if you would meet in the jury room immediately behind this courtroom at about a quarter to ten so we can be sure everybody is checked in.

Do not talk about the case among yourselves or to anyone else.

(Whereupon at 3:47 p.m. the trial in the above-entitled matter was recessed until 10:00 a.m. on Thursday, January 18, 1968.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 335-67

UNITED STATES OF AMERICA

v.

BARRINGTON JOSEPH JOHNSON,

*Defendant.*

Washington, D.C.,

Thursday, January 18, 1968.

The above-entitled matter came on for further trial before the Honorable Howard F. Corcoran, United States District Judge, and a jury at 10:10 a.m.

APPEARANCES:

On behalf of the Government:
NICHOLAS NUNZIO, ESQ.,
Assistant United States Attorney

On behalf of the Defendant:
SAMUEL F. IANNI, ESQ.

PROCEEDINGS

THE COURT: Good morning, ladies and gentlemen.

. . . . Good morning, Your Honor. . . .

THE COURT: Are you ready to proceed?

MR. NUNZIO: Yes, Your Honor. We have reached cross-examination.

Whereupon,

LUELLA ESSIE MAYES,

the witness on the stand at adjournment, resumed the witness stand, was examined and testified further as follows:

CROSS-EXAMINATION

BY MR. IANNI:

Q Mrs. Mayes, you understand that you are still under

oath and the mere fact that you took that oath yesterday and have gone home that it doesn't make it any less than it was yesterday. Do you understand that?

A Yes.

Q How long have you worked at St. Elizabeths Hospital?

A Since December of 1959.

Q On January the 22nd, what were to be your hours of employment?

A 7:00 to 3:30.

Q What time did you leave home?

A Twelve minutes after six.

Q And about how long did it normally take you to drive from your home to St. Elizabeths?

A About 15 minutes.

Q Now, did you have any trouble with the automobile prior to it dying out where it did at the stop sign?

A You mean after I left home?

Q Yes.

A No.

Q Do you know how long it took you to get from home to where your automobile stopped?

A Approximately—I can't remember right now.

Q Well, approximately.

A Well, I would say about five minutes.

Q Five minutes. Well, how far were you from St. Elizabeths Hospital at that time?

A Only a few blocks.

Q And how long did it normally take you to drive to St. Elizabeths from your home?

A To drive from home, it would take me normally about ten minutes.

Q So that you were more than half way, right?

A Yes, I was.

Q So, at the time you arrived at the place where your car broke down, it was approximately about 6:20; is that correct?

A Something like that, yes.

Q But was only eight minutes after you had left your home, is that correct?

A Yes.

Q Now did you immediately go into the gas station?

A Yes, I did.

Q Right away? You didn't try to start it or try to find out what was the matter with it?

A I tried to start it after it cut off and then I got out of the car and went to the service station.

Q Where was the attendant at the service station?

A He was inside the station.

Q He was in the inside of the station. And you had to go in to get him to bring him out, is that correct?

A When I walked over to the station, he came outside.

Q He came outside and met you?

A Yes.

Q And did you have a conversation with him?

A I just told him my car had stopped and asked him if he could start it for me.

Q And then you had to tell him where your car was, is that correct?

A Well, he could see it. It was parked right at the corner.

Q He could see it. Well, then, did he go over to take a look at it?

A Yes, he did.

Q And how long did it take him to go over and take a look at it?

A I don't know how long.

Q Well, I mean, you can estimate. Did it take a little while or very long?

A Well, it didn't take too long.

Q He went over and he tried to start it, is that right?

A Yes.

Q He looked at the hood, is that correct?

A Yes.

Q He looked in there, is that correct?

A Yes, he looked at it.

Q Did you [illegible]e over with him?

A No, I didn't.

Q You stayed at the station?

A Yes.

Q Then there came a time that he came back, is that correct?

A Yes.

Q And he told you something like he didn't know what was the matter with your car, or he thought it was the battery; is that right?

A Yes.

Q Now, then you got on the phone and called your husband, is that right?

A Yes, I did.

Q All right.

Now, then you had a pretty long conversation with your husband because you told him it had broken down and you told him what the attendant had told you, isn't that correct?

A Yes.

Q And then Mr. Johnson came into the gas station after that, is that right?

A He came into the station while I was talking on the phone.

Q While you were talking on the phone.

Now, he pulled into the gas station just like any other customer would, is that correct?

A Yes.

Q He pulled up to the gas pumps?

A Yes.

Q Where was the telephone in relation to your car, was it in the building or was it on the outside?

A No, it was on the outside.

Q Was it closer to the building than the building was to your car, or was the telephone closer to your car?

A No, the telephone was closer to the building.

Q It was closer to the building. In fact, you would have to walk past the gasoline pumps—When walking from

the telephone to your car, you would have to walk past the gasoline pumps over to your car; is that correct?

A There was two pumps there and one of them, you would, yes.

Q Now, did he pull up and jump right out of his car and come over to you, or did he sit there a while?

A Well, he pulled over to the pump and got out of his car and came over to the phone booth and asked me was I having trouble.

Q Was the service attendant standing beside you at this time?

A The service attendant had come back.

Q He had come back?

A Yes.

Q Was he standing close to you?

A He was standing outside the phone booth.

Q Well, did Mr. Johnson come up to you in the phone booth or did he come up to the service attendant?

A No, he came up to me in the phone booth.

Q He walked past the service attendant and what, opened the door of the phone booth, or what?

A The door was open. I had the door open.

Q And he asked you where you had to go; is that it?

A How far I had to go.

Q How far. And what did you tell him?

A I said to St. E's.

Q Did you tell him approximately how far that was?

A No, I didn't.

Q You didn't.

Well, did you decide right then and there to have him push you or did you talk to your husband a little further on it?

A I told my husband that he said he would push me and he said, "Okay."

Q And after you talked to your husband, you decided it was all right; is that correct?

A Yes.

Q Now, then you hung up and went over to your car, is that correct?

A Yes.

Q Did you go over immediately?

A Yes, I did.

Q Did you ask the attendant if you owed him anything?

A I said, "Thank you" to him.

Q You didn't ask him if you owed him anything and he didn't ask you to pay him anything, is that it?

A No, I didn't.

Q Now, how did Mr. Johnson have to get his car from where it was parked into where he could push you?

A He had to turn it around.

Q And this took a little bit of time, didn't it?

A Only a minute to turn the car around.

Q Just a minute. All right.

And then he came around when he was behind you. When he got behind you, were you already in the car?

A Yes, I was.

Q All right. Now, were you still at the stop sign at that time?

A Yes.

Q He started to push you out onto Nichols Avenue; is that correct?

A Yes.

Q Did you wait to see if traffic was clear?

A There wasn't any traffic coming at that time.

Q There wasn't any traffic. But you did take a look to be sure if it was clear, is that correct?

A Yes.

Q And then he started to push you.

A Yes.

Q Now, it is your testimony that this was a distance of about five or six blocks, isn't that correct?

A Yes.

Q And that was to the gate at St. Elizabeths?

A This was to the building where I worked.

Q To the building where you worked.

A Yes.

Q Well, now, could you go very fast while he was pushing you?

A No.

Q What was the fastest, maybe five or ten miles an hour?

A I don't know.

Q And you turned into St. Elizabeths. Did he know where to push you or did you have to tell him?

A Well, I was driving my car and he pushed me.

Q Wherever you went, he pushed?

A Yes.

Q Now, there came a time when you came up to the parking area where you normally parked, is that correct?

A Yes.

Q And it was there that he stopped pushing you, is that correct?

A Just before we got to the parking lot.

Q Just before you got to the parking lot. And you became concerned so that you turned around and said, "Are you going to push me any further?" Is that correct?

A Yes.

Q And he said there was this other car whose lights were blinding him.

A Yes.

Q Then you both waited there a while for that other car or whoever was driving that other car to leave; is that correct?

A Yes.

Q Did you have to wait about five minutes?

A I don't know how long we waited.

Q It seemed like a long time though, didn't it?

A No, it didn't.

Q Well, then, was it right away?

A Whoever it was in the other car, they were parking anyway at the time.

Q When you pulled up there, this person was in the car, right?

A Yes, the lights were on.

Q The lights were on.

A Yes.

Q And then did there come a time when this person turned the lights off and got out of the other car?

A Right.

Q Then it was only after this happened and that person left that Mr. Johnson then pushed you into this spot?

A Yes.

Q Now, after he pushed you into this spot, your car came to a rest and his car came to a rest, where was his car in relations to yours?

A Right behind mine.

Q Right behind. And at that time he got out and came up to your car, right?

A Yes.

Q Did he open the door or had you already opened the door?

A I had opened the door to get out.

Q You had already opened the door. By the time he came up, you had already turned off your lights and were starting to get out, is that correct?

A Yes.

Q And then it was at this time that he pushed you back into the car?

A Yes.

Q Now, what did you say, if anything, when he pushed you back in?

A I don't remember saying anything.

Q You didn't say anything like "What are you trying to do?" or "What's the story here?" Nothing like that?

A I don't remember saying anything.

Q You don't remember saying anything.

Well, then, he said, "Get out," is that it?

A He told me to move over.

Q What did you say in response to that, if anything?

A I said I couldn't move over.

Q Well, when he told you to move over, what did you think he was trying to accomplish?

A I really didn't know.

Q You don't know. Well, then, you say you told him you couldn't move over because of the console, is that it?

A Yes.

Q Did he ask you to get out?

A He grabbed my arm and told me to get out.

Q He grabbed your arm. Now, which arm did he grab?

A It was my left arm.

Q Your left arm. With which of his arms did he grab you?

A I don't know.

Q You don't know?

A I don't know. I didn't notice.

Q Then he took you out. Let me ask one question here. Was your physical appearance on January the 22nd, that day, any different or substantially any different than it is today?

A What do you mean?

Q You appeared physically as you do today, is that correct?

A Except for my thyroid.

Q Well, your thyroid at that time had already been removed, isn't that correct?

A No, it had not.

Q It had not?

A No.

Q Oh, I thought it was your testimony on direct examination that your thyroid had already been operated on.

A No, I hadn't had it yet.

Q All right. Now, he got you out into his car. Now, when you got back into his car, was his car running at that time?

A Yes.

Q And while he was taking you from his car—Did you say "yes" to that?

A Yes, the car was running.

Q You said the car was running?

A Yes.

Q Are you sure of that?

A I think it was running.

Q Well, Mrs. Mayes, you remember testifying before the United States Commissioner in this building some time ago?

A Yes.

Q And on that particular day, you were sworn, isn't that correct?

A Yes.

Q Do you recall

MR. IANNI: The Court's indulgence, Your Honor.

(Pause in proceedings.)

MR. IANNI: I will let that go at this time, Your Honor. I can't seem to find what I would like.

THE COURT: We will strike that question. The jury will disregard it.

MR. IANNI: Yes.

(Government counsel and defense counsel conferred privately.)

MR. IANNI: Mr. Nunzio was kind enough to point it out, Your Honor.

MR. NUNZIO: Merely as an amicus curiae, Your Honor.

BY MR. IANNI:

Q This question was asked of you: "And what did you do? Was his car still running when you got back in it? Do you remember?"

And your answer was, "I don't remember."

Do you remember testifying and giving that answer?

A I don't recall.

Q You don't recall.

A No.

Q But that could have been your answer on that particular day?

A It could have been.

Q So on that day, your answer could have been that you didn't remember whether his car was running but your answer today is that his car was running, is that it?

MR. NUNZIO: Objection, Your Honor. The witness said she thinks it was running.

THE COURT: Yes. I think you are misquoting her, Mr. Ianni. You had better clarify this. There seems to be some confusion.

BY MR. IANNI:

Q Do you remember if his car was running?

A I said, I think it was running.

Q You said you think it was running.

Now, what kind of a car did he have?

A It was a small Ford.

Q And do you remember whether it was an automatic transmission or a standard transmission car?

A No, I don't remember that.

Q When he got you in the car, did he immediately take off?

A Yes, he did.

Q Did you scream at any time from the time he took you from your car to his?

A No, I didn't.

Q Did you make any noise?

A No, I didn't.

Q What did you think was going to happen to you at this time?

A I didn't know what was going to happen to me because I was scared to death.

Q You were scared. Well, he didn't have a weapon, did he?

A No, he did not.

Q You didn't see any weapon, did you?

A No.

Q Then he wasn't threatening you with any weapon, was he?

A No.

Q Then it is your testimony that when he got to his car, he put you in. Which side of the car did he put you in?

A He pushed me in on the driver's side.

Q And then he got in after you?

A Yes.

Q He then had to back up, is that correct?

A I don't remember that either.

Q You don't remember whether he backed up or had to go straight ahead in pulling away?

A I don't remember him backing the car up.

Q You don't remember him backing the car. Well then, he left the grounds of St. Elizabeths, is that correct?

A Yes.

Q From the place where you people were, it is a fairly considerable distance up to the gate of St. Elizabeths, isn't that correct?

A Yes, it's a distance.

Q And on that particular day as there is every day, but on that particular day, there is a stop sign that controls the intersection of the exit of St. Elizabeths at that area onto Nichols Avenue, is that not correct?

A Yes.

Q And in addition to that, there is a guard at a station there, is that not right?

A Yes.

Q And in fact, to get up to that approach, it's a little rather steep incline, isn't that true?

A What do you mean an incline?

Q Well, from the bottom just before you get to the entrance, the lowest point you hit going up to Nichols Avenue which isn't very far, maybe only a couple car lengths, isn't that correct? There is a rise of maybe about ten feet?

A I don't understand the question.

Q Well, to get up to Nichols Avenue, you have to go up a hill.

A No, that was not the gate we came out of.

Q Which gate did you come out of?

A Out of No. 4 gate, up by the Safeway.

Q But there was a guard there at that gate, is that right?

A I guess the guard was there.

Q At this time, did Mr. Johnson have his arm around you?

A No, he still was holding my arm.

Q And he stopped at the stop sign, did he not?

A No, I don't think so because I think the light was green when we came through the gate.

Q You mean, he just drove right onto Nichols Avenue, not stopping at the stop sign?

A It's not a stop sign at this gate, it's a light.

Q You mean a red light and green light?

A Yes.

Q And it is your testimony that he had the green light.

A Yes. I don't remember him stopping at the gate.

Q You don't remember him stopping.

And at that time, you made no effort to call the guard, did you?

A No. There was no guard out there. He could have been in the guard house, but he wasn't outside.

Q Is this a guard house with windows where the guard can see people going by?

A You don't always see the guard when you come out the gates at St. E's.

Q But the guard takes a look in the cars to see who is going out, doesn't he?

A No, he doesn't.

Q You don't recall the guard taking a look at you that day?

A No, I don't.

Q Well, then he turned right on Nichols Avenue, is that right?

A Yes.

Q And he went some place and he stopped for gas.

A Yes, down the hill.

Q All right. When he pulled up, the attendant of that gas station, where was he?

A Where was who?

Q The service station attendant of the gas station that

you went to where he got the gas?

A He came up to the car to find out how much gas he wanted.

Q All right. When he pulled over to the pumps, this man was in the building; is that right?

A I don't know where he was. He came up to the car, I know.

Q Did the car come to a stop before the attendant came there and asked him how much gas he wanted?

A He came right up to the car as soon as we drove in.

Q Then Mr. Johnson rolled down the window, is that it?

A Yes.

Q And at that time, he had his arm around you, right?

A Around my neck, yes.

Q Around your neck. And the service station attendant came up to the window?

A Yes, he did.

Q So that he was maybe as close to you as I am to this juror here, isn't that correct?

A Yes.

Q And you didn't scream or make any outbursts then, did you?

A I could not scream then.

Q Why couldn't you scream? He had his arm around your neck, I understand that; but did he have his hand over your mouth?

A No, he did not.

Q And at this time you hadn't seen any weapon or anything yet, had you?

A No, I hadn't.

Q In fact, you never saw a weapon, did you?

A No, I didn't.

Q Now, the man gave him a dollar's worth of gas and then Mr. Johnson paid him. Where did Mr. Johnson get the money to pay him?

A He pulled it out of his pocket.

Q Which pocket?

A I think it was his left pocket.

Q Did you see him take the money out of his pocket?

A He pulled something out of his pocket and paid the attendant.

Q With which hand did he pull it out?

A Well, he had his right hand around my neck, so it must have been his left.

Q It must have been his left hand. Did you see him take the money out?

A I know he pulled something out of his pocket. I did not see the money, no.

Q And then after he paid him, he rolled up the window and he drove off; is that correct?

A Yes.

Q Now, then quite a bit of time was consumed in his riding around different parts of Southeast, isn't that correct?

A He didn't ride in too many different parts.

Q Well, did he talk to you during this time?

A He was talking while he was driving.

Q How long do you estimate it took him to go from the place where he bought the dollar's worth of gas to where he stopped?

A I don't know how long. It wasn't long.

Q It wasn't long?

A No.

Q Well, let me ask this: From where he put you in his car at St. Elizabeths to the gas station where he bought the gas, do you have any idea how long it took him to get there?

A I would say about five minutes.

Q About five minutes.

Now, to where he parked, was it a longer time or a lesser time than it was from the place he put you in the car at St. Elizabeths to the gas station?

A Longer.

Q It was considerably longer, was it not?

A No.

Q Well, it was at least twice as long, maybe even three times as long—

MR. NUNZIO: Objection, Your Honor. He is arguing with the witness.

THE COURT: She has already answered no.

BY MR. IANNI:

Q Well, now, when you got to the spot where this happened—strike that.

Let's go back. While he was driving away from the gas station, did he still have his arm around you?

A Around my neck, yes.

Q Then there came a time that he released you, so to speak?

A When he parked the car.

Q I beg your pardon?

A When he parked the car, stopped.

Q You mean he had his arm around you the whole time from when he left the gas station to when he came to where he parked the car?

A No, not that whole time.

Q Not that whole time. Well, when did he release you?

A This, I don't remember—

Q You don't remember.

A —just when it was.

Q Well, now when you got to the place where he parked the car, what is the first thing he said?

A He asked me if I was married.

Q And you told him you were.

A Yes.

Q And then he asked you if you had any children?

A Yes.

Q And you told him you had three?

A Yes.

Q Then what did he ask you, if anything?

A He asked me did I love my husband.

Q Just that way; were those his exact words?

A No. He said, "I bet you love your husband, don't you?"

Q And you told him you did not.

A I said, "No."

Q Then what, if anything, did he say?

A I remember he reached across to me and he said, "I told you before to take your underclothes off."

Q You mean he had told you this before?

A When we were riding along, yes.

Q You mean when you were riding along, he told you to take your underclothes off?

A Yes.

Q Did you ask him why?

A No, I didn't.

Q Well, when he first asked you to take your underclothes off, what did you tell him, if anything?

A I didn't say anything.

Q You didn't say anything. You pretended like you didn't hear him?

A I just didn't say anything.

Q Then, you say, after he parked, this was the second time he asked you to take your underclothes off?

A Yes, it was.

Q Did he specifically say what underclothes he wanted you to take off?

A He just said my underclothes.

Q Just your underclothes.

At this time had he touched any parts of your privates?

A No.

Q Had he touched any part of your body below your neck?

A No.

Q Had he attempted to kiss you?

A No.

Q And when he asked you to take your underclothing off, what did you tell him?

A Well, when he reached for me, he said he would take them off. I said, no I would do it and I removed them.

Q You told him this before he even touched you, is that correct?

A Told him what?

Q That you would take—You said; He reached for me and I told him I would take my underclothes off.

A He said he would take them off and I said I would do it.

Q So, you told him that you would before he even touched you?

A I don't understand that.

Q Well, you said he reached for you.

A Yes.

Q Now, did he touch you?

A No.

Q So that before he touched you, you told him that you would take your underclothes off?

A I said I would do it.

Q Just prior to this, when was the last time that he had had his arm around your neck?

A I can't tell you that. We were parked for some time before then.

Q You were parked for some time before this came about?

A Yes.

Q How long do you imagine it took you to take your underclothes off?

A I don't know.

Q It was pretty hard to do it, wasn't it?

A Yes, it was.

Q I mean that was a small car. It was cramped conditions. It took considerable time, did it not?

A I don't know how long it took.

Q And what items of clothing, if any, did you take off?

A My stockings, my girdle and my pants.

Q You took them off inside the car. You didn't get out of the car to take them off, did you?

A No, I didn't.

Q And this occurred in the front seat?

A Yes.

Q Was this car a two-door or a four-door car?

A I think it was a two-door.

Q What was he doing while you were taking your clothes off?

A All I can remember him doing is taking his jacket off and laying it on the back seat of the car.

Q After you got your clothes off, what did you do, if anything?

A Well, he proceeded to have relations with me.

Q Well, now, how did you get into the position where this act occurred?

A He slid over on the seat and pushed me down on the seat.

Q He slid over and pushed you down?

A On the seat, yes.

Q Where was your head in relation to the steering wheel?

A My head was at the car where the steering wheel is.

Q In other words, your head was closer to the driver's seat and your feet were over where the passenger would sit in the front seat, is that it?

A Yes.

Q You say he pushed you in that position or you got in that position?

A No, I didn't get in that position; he pushed me down on the seat.

Q Did he ask you to get in that position first?

A No.

Q So, after you had taken your clothes off, you were just sitting there, is that right?

A Yes.

Q At this time, were the privates of your body exposed?

A What do you mean "exposed"?

Q Well, could someone see them, or were they still covered up with your skirt and slip?

A Yes.

Q They were still covered with your slip and skirt:

A Yes.

Q Then after you got in that position, he got on top of you?

A Yes.

Q Well, was it you who pulled your skirt up, or was it him?

A No, he pulled it up.

Q He pulled it up. Now, at any time during this entire time, did you ever tell him no?

A No what?

Q That you didn't want to do this, whatever he was going to do?

A No, I only kept begging him to take me back to work.

Q That's all. And you never said no; you never tried to stop him; you never put your hand up; and you never cried out. Is that correct?

A He had told me if I wouldn't scream, he wouldn't hurt me.

Q Well, when did it come to your mind that he may be thinking of sex?

A When he told me to remove my underclothes.

Q You mean before that time, you never had any idea that he was thinking of sex?

A I didn't know what he was thinking of. I thought he was going to kill me, really.

Q How did you think he was going to kill you?

A I don't know, I was just afraid.

Q Why did you think he was going to kill you?

A I just did.

Q You didn't know him before, did you?

A No.

Q He had no grudge against you, did he?

A No.

Q Let me ask you: Did he look strange or unusual?

A No.

Q Did he look drunk, or was he drunk?

A I don't know whether he was drunk or not.

Q You don't know. But, really, up until the time he asked you to take your clothes off, sex never entered your mind?

A Everything entered my mind, but I had no idea what he was going to do with me, no.

Q Just approximately how long did this act take place, the sexual act?

A I don't know.

Q You don't have any idea?

A No.

Q Well, after the sexual act occurred, what happened then?

A Well, he got up and he said he had messed his pants up.

Q Uh huh. Well, did you get up then too?

A I sat up on the seat, yes.

Q Let me ask you this: Did he get out of the car there?

A No.

Q Did you get out of the car?

A No.

Q Well, after this was over, you both went back to your respective places in the car that you had been before?

A Yes.

Q Somehow.

A Yes.

Q And you then put your clothing back on, is that correct?

A Yes, I did.

Q Now, this was considerably difficult to do also, was it not?

A Yes, it was.

Q And it was quite time consuming, is that right?

A Well, I put my clothing back on while he was driving.

Q You mean you put your clothes on while he was driving back to St. Elizabeths?

A Back to Nichols Avenue.

Q In fact, you were anxious to get back to work because by this time, it wasn't 7:00 o'clock yet, was it, and you were hoping that you would still get to work on time? It that right?

A It was after 7:00.

Q It was after 7:00?

A I am sure it was.

Q Well, would you say the act occurred after 7:00 or before 7:00?

A Before 7:00 because it was still dark.

Q Before 7:00. Quite a ways before 7:00?

A I don't know.

Q You don't know.

A I know it was still dark.

Q You know it was still dark.

A Yes.

Q Do you remember what time you got to work?

A You mean back to work, when he took me back to work?

Q Yes.

A No, I don't recall what time it was.

Q Mrs. Mayes, did you at any time tell anybody that the act occurred about 6:45?

A I probably did at the time I gave the statement, but now I don't remember all the exact times.

Q But you said it probably occurred about 6:45.

A I couldn't say that now.

Q I am only asking you did you ever tell anybody that it occurred about 6:45?

A I told the Sex Squad what time I thought it happened.

Q And you told them you thought it happened about 6:45, is that not correct?

A I don't know what time I told them, but I did at that time.

Q And you told the Sex Squad that very morning when it happened, so it was fresh in your mind; is that right?

A Yes.

Q Now, when Mr. Johnson brought you back to St. Elizabeths Hospital, did you tell him where to take you?

A No, I did not.

Q How is it that he got to the building where he took you?

A He went in the first gate to the left off of Nichols

Avenue and drove me around to the building.

Q Did he drive past your parked car?

A No, because the parking lot is really kind of on the side of the building. Directly past it, no; but past the parking lot, yes. He had to pass the same parking lot.

Q But he knew exactly where to take you?

A Yes.

Q And you say it was during this time that he took your keys from you?

A He didn't take my keys, he asked me for my car keys.

Q And you gave them to him?

A Yes, I did.

Q Where did you get them from?

A Out of my purse.

Q Then what did he tell you to tell your husband about the keys?

A I told him my husband might come up to see if he could start the car during the day. He told me to tell him they were in my locker and I couldn't get them.

Q Do you have a locker at work?

A Yes, I do.

Q Do all employees have a locker at work?

A Yes, they do.

Q Then you say he wrote down this name "Charles" and a phone number and gave it to you?

A Yes.

Q And he told you to go in the building and don't look around, is that right?

A He told me to get out of the car and walk into the building and not try to get his tag number. He said he had borrowed the car anyway, it wasn't his.

Q Well, after you got out of the car and went into the building, did you ever look back?

A After I got into the building, I looked back.

Q You did?

A Yes.

Q Now, you got into the building and did you meet your supervisor immediately?

A I went straight to the supervisor's office.

Q You went straight to the supervisor's office. And what is that person's name?

A Mrs. Fushee was the supervisor that day.

Q She is the first person you talked to?

A Yes.

Q When you went in to her, what was it that you asked? Well, let me put it this way: When you first went in to her, you asked her for annual leave, isn't that correct?

A No, I did not.

Q You didn't ask her for annual leave?

A No.

Q Never did you ask her for leave?

A No.

Q You did not?

A No.

Q You don't ever recall asking her for leave?

A No, I do not.

Q What is her first name?

A I don't know her first name.

Q You don't know her first name?

A No.

Q How long has she been your supervisor?

A She is not, she was the acting supervisor at the time.

Q Well, how long had you worked under her?

A I had never worked directly with her.

Q How do you spell her name?

A F-u-s-h-e-e.

Q Do you know where she lives?

A No, I don't.

Q Does she work in the day?

A I do not know.

Q Would she normally work the same shift as you worked?

A She works day shift, yes.

Q She works day shift.

A Yes.

Q Where does she work?

A She usually works in the Geriatrics Building, Geriatrics No. 2.

Q Building No. 2?

A Ward 2.

Q Ward 2. And then after what you told her, she called a certain official?

A Yes.

Q Now, Mrs. Mayes, you were married on that day—I mean, you and your husband lived together?

A Yes.

Q And that night before, immediately before this happened, you had slept with your husband?

A Yes.

Q And you had intercourse with your husband that night, is that correct?

A Yes.

Q Do you know about what time of the night you had intercourse with him?

A Between 10:00 and 11:00.

Q Between 10:00 and 11:00.

So that was at the most about seven hours before this occurred, is that correct?

A Yes.

Q Were you and your husband at this time having any marital difficulties?

MR. NUNZIO: Objection, Your Honor, unless he can show relevancy.

MR. IANNI: May we approach the Bench, Your Honor?

THE COURT: Approach the Bench.

(AT THE BENCH:)

MR. IANNI: Of course, Judge, I am put in a position where I possibly have got to show some motive. The defendant will testify that he had nothing to do with this woman. I am put in the position that we will try to have to explain some motive for her actions.

I can think of a couple possibilities, but one possibility is if she didn't have sexual relations with her husband that

night but she had it with somebody else and she was afraid maybe she had gotten pregnant and she wanted to cover herself, then it would have been a motive on her part to holler rape.

MR. NUNZIO: Go ahead, Sam, ask it. I have no objection, Your Honor.

THE COURT: I think it is very remote. If you have no objection, I will allow it. Normally, I would strike it.

Go ahead, ask it.

(IN OPEN COURT:)

BY MR. IANNI:

Q Mrs. Mayes, I believe the question was: Were you and your husband having marital problems at this time?

A No, we were not.

Q You were not.

A No.

Q You did get to work late this morning, is that correct?

A Yes.

Q When you first went to Mrs. Fushee, did she speak to you first or did you talk to her first?

A I walked into the office and there was a clerk sitting there and I asked her could I talk to her.

Q Did she ask you why you were late?

A No.

Q She didn't ask you why you were late?

A No.

Q You immediately told her what had happened?

A Yes.

Q Mrs. Mayes, I want to try to find out how many of these garments you took off. You never took this thing off during the act, did you?

A No, I did not.

Q Was it buttoned?

A I think it was buttoned.

Q Now, what were you wearing underneath this, if anything?

A A blouse.

Q A blouse.

A Uh-huh.

THE COURT: For the record, would you identify the garment which you just showed the witness?

MR IANNI: The garment which the complainant has just identified was No. 1, only the blouse of the suit.

THE COURT: The jacket of the suit, Exhibit No. 1.

MR. IANNI: The jacket, yes.

BY MR. IANNI:

Q Was this the blouse that you wore that particular night, that day?

A Yes.

Q How would this normally go on you, as I have it hanging right now in front of me?

A Yes.

MR. IANNI: For the purpose of the record, may the record show that the blouse identified by Mrs. Mayes is Government's Exhibit 2, that it is a blouse.

BY MR. IANNI:

Q Would this normally be buttoned in the back?

A Yes.

Q And this did go rather tightly around your neck, is that correct, or it went all the way up to your neck?

A Yes, uh-huh.

Q Right underneath the blouse, what would you have between the blouse and your skin, if anything?

A Slip and a bra.

Q Nothing but the blouse?

A Slip and a bra.

Q Slip and a bra.

A Yes.

Q The slip would go on you between the blouse and the bra, is that it?

A Yes.

Q And the slip is Government's Exhibit No. 3.

Now, Mrs. Mayes, when you had this slip on, would this lace part, which is the upper part, would that be over your breast?

A Yes.

Q And that would be over the part where the bra was, is that correct?

A Yes.

Q So that that part of your slip covered the bra?

A Yes.

MR. IANNI: The Court's indulgence for just a moment.

(Short pause in proceedings.)

BY MR. IANNI:

Q. Mrs. Mayes, you had never known Mr. Johnson prior to this date, is that correct?

A No.

Q And as far as you know, he never knew you?

A No.

Q Now, Mrs. Mayes, when the police asked you to come up to St. Elizabeths to possibly identify Mr. Johnson, he didn't deny that you were the woman that he had pushed, isn't that correct?

A No, he did not.

Q The only thing that he denied was that you were in his car or that he had had intercourse with you, isn't that right?

A Yes.

Q And he didn't deny that the keys which he had were yours, is that right?

A Yes.

THE COURT: Could we clarify that. He did or didn't?

MR. IANNI: He did not deny it. At least that was my understanding of the answer.

THE COURT: The answer is not responsive.

Did he or did he not?

THE WITNESS: No, he did not.

BY MR. IANNI:

Q I mean, he said they were your keys, right?

A Yes.

Q The only difference was that he said you had given them to him.

A Yes.

MR. IANNI: I have nothing further of the witness, Your Honor.

THE COURT: Is there any redirect?

MR. NUNZIO: Yes, Your Honor. Does the Court wish to take its morning recess at this time?

THE COURT: Go right ahead.

MR. NUNZIO: Thank you, Your Honor.

## REDIRECT EXAMINATION

BY MR. NUNZIO:

Q Now, Mrs. Mayes, what else did the defendant say at the time you identified him to the police concerning this incident? He did not deny that he had your keys. What else did he say he had done besides push you?

A He said he had pushed my car onto the grounds and I had gave him the keys and asked him to come back that evening and start my car.

Q You were present when he denied that you had ever been in his car? He denied that you were in his car, right?

A Yes, he said I hadn't been in his car.

Q Did he deny that he had had any sexual intercourse with you?

A He only said that he had pushed my car onto the grounds that morning, that was all.

Q Now, with respect to your testimony concerning your relations with your husband the night before: You had in fact had relations with your husband between 10:00 and 11:00 o'clock on the evening of the 21st of January, is that correct?

A Yes.

Q I take it you had cleaned yourself up after you had relations with your husband?

A Yes.

Q With respect to the exhibits before this Court, Mrs. Mayes, specifically Government's Exhibit No. 5 for identification and moved into evidence, were these pants put on clean on the morning of January 22nd, 1967?

A Yes, they were.

Q What about the panty girdle, was that put on clean

that morning as well?

A Yes, it was.

Q What about the slip?

A They were all clean that morning.

Q All clean that morning. The bra too?

A Yes.

Q I take it Government's Exhibits 1 and 1-A, your suit, that you wore on the morning in question was pressed at the time. It wasn't in the wrinkled condition it is in now, is that correct?

A Yes.

Q With respect to the blouse, was it loose at the waist at that time or snug, if you can recall?

A I don't recall it being too snug.

Q If you can, Mrs. Mayes, can you recall how high the defendant pushed your clothing prior to the time that he had sexual intercourse with you in that car, if you know? If you don't know, tell us.

MR. IANNI: Objection, Your Honor.

THE COURT: You opened up the whole question.

BY MR. NUNZIO:

Q If you can recall, Mrs. Mayes.

MR. IANNI: All I want is the witness to testify rather than Mr. Nunzio. That is the purpose of my objection.

MR. NUNZIO: I am not testifying, Your Honor. If you can recall.

THE COURT: All right. Go ahead.

BY MR. NUNZIO:

Q Do you recall how high he pushed your things up?

MR. IANNI: Objection, Your Honor. The purpose is this: Mr. Nunzio, by his question, is trying to lead the witness into saying it was a hard push. That's the purpose of my objection.

THE COURT: Rephrase your question.

MR. NUNZIO: Your Honor, may I state for the record, counsel had asked me were her things pushed—

THE COURT: The door is wide open, so go ahead and walk through. Just reframe your question.

MR. NUNZIO: All right. Let me handle it a little differently and perhaps that will satisfy counsel.

BY MR. NUNZIO:

Q Your clothing was elevated by the defendant prior to the sexual intercourse, is that correct?

A Yes.

Q Do you recall how high they were elevated by the defendant prior to the sexual act?

A No, I don't.

Q All right. Thank you.

At the time that you passed through the gate as the defendant was taking you out of the grounds of St. Elizabeths, you testified that he had his arm around your neck at that time; is that correct?

A No, he had ahold of my arm.

Q Were the windows rolled up or down, Mrs. Mayes, if you can recall?

A I don't recall the windows being down.

Q You do not remember the windows being down.

A No.

Q Did you see a guard at that gate at all, Mrs. Mayes?

A When we left the grounds, no, I did not.

Q You testified the light was green and you went straight through the gate.

A I don't remember waiting there for the light to change.

Q You testified and told counsel you were afraid for your life at the time he took you out of the hospital grounds, that you had no knowledge as to what he intended to do to you at that time; is that correct?

A Yes.

Q Were you in fear for your life at the time when he pushed you in his car?

A Yes, I was.

Q Were you in fear for your life at the time he had sexual relations with you?

A I was scared to death the whole time I was with him.

Q Were you in fear for your life at the time that he dropped you back off at the hospital, Mrs. Mayes?

A Yes, I was.

Q With respect to the times that counsel for the defendant was questioning you about, Mrs. Mayes, did you have a watch on that morning?

A I am sure I did. I always wear my watch to work.

Q During the course of this escapade, did you check your watch at the time to calibrate what was happening at what specific time?

A No, I even forgot I had it on, really.

Q Is it your testimony, then, that you were giving approximations of the times?

A Yes, I was.

Q With respect to Mrs. Fushee, did you say anything concerning leave, as counsel has asked you about?

A No, I did not.

Q What were your first words to Mrs. Fushee?

A I walked in the office and I asked her if I could talk to her.

Q Did you talk to her?

A Yes, I did.

Q What did you say to her?

A I told her what had happened.

Q Is that when she called the other personnel and, subsequently, the guards came?

A Yes.

Q Now, you testified that when the defendant went for gas, he had his arm around your neck, is that correct?

A Yes.

Q Was part of his arm around your thyroid?

MR. IANNI: Objection. I have given Mr. Nunzio leeway because I think the jury ought to know what went on, but he is leading this witness. It's really him testifying, not the witness.

THE COURT: I think you are getting very, very repetitious. The jury recalls what she said before. Don't just repeat the testimony and say, Is that so? If you have any-

thing by way of rebuttal, bring it out, but don't repeat everything.

MR. NUNZIO: Yes, Your Honor.

BY MR. NUNZIO:

Q During the time just prior to the sexual act, after the defendant had parked the car in that area, were the windows up or down at that time, if you can recall?

A I think they were up.

MR. NUNZIO: I have no further questions then, Your Honor.

## RECROSS-EXAMINATION

BY MR. IANNI:

Q. Mrs. Mayes, you stated in response to Mr. Nunzio's last question that you thought the windows were up just before the sexual act.

A Yes.

Q Well, you know they were up, don't you?

MR. NUNZIO: Objection, Your Honor. He is arguing now with the witness.

BY MR. IANNI:

Q Yes or no?

MR. NUNZIO: Objection.

THE COURT: Now, wait a minute. She said she thought they were up.

MR. IANNI: That is correct.

THE COURT: All right. Now, ask her if she knows whether or not they were up, and let's stop this argument.

BY MR. IANNI:

Q Do you know whether they were up or down?

A No.

Q Well, did he ever roll them down?

A Yes.

Q When did he roll them down?

A The window on his side, when I said I thought I heard cars.

Q When the sexual act was going on, you told him you thought you heard a car; is that right?

A I said I thought I heard cars, yes.

Q In fact, you said that a couple of times during the sexual act, isn't that correct?

A I don't know how many times, but I did say it.

Q And to rest your assurance that you didn't hear a car, he rolled the window down; isn't that right?

MR. NUNZIO: Objection, Your Honor, that is speculative.

THE COURT: Strike that question.

BY MR. IANNI:

Q Well, did he roll the window down?

A Yes.

Q And when he rolled the window down, he said, did he not, See, there are no cars here?

A He said he could see out on the street and there were no cars.

Q All right. And then you even told him your thought you heard the police, is that right?

A Yes.

Q And during this entire time, you didn't scream, did you?

A During the time of the sexual act?

Q Yes.

A There weren't any houses or cars around.

Q Well, you thought there were cars around, didn't you?

A I thought I could hear cars on the street, yes.

MR. IANNI: Nothing further, Your Honor.

## FURTHER REDIRECT EXAMINATION

BY MR. NUNZIO:

Q Would you tell the ladies and gentlemen why you told him you thought you heard cars and the police?

MR. IANNI: Objection.

THE COURT: Wait a minute, gentlemen. We have been through direct. We have been through cross. We have been through redirect and recross. If you have anything further, come to the Bench and let me see if it is worthwhile putting on. This is ridiculous.

(AT THE BENCH:)

THE COURT: What else have your got?

MR. NUNZIO: I want to bring out the reasons for these statements were to the effect she thought he would stop.

THE COURT: You have all mishandled this thing. You have gone way beyond his cross, and you went beyond his redirect. I don't know why you didn't get this in on the first go around.

MR. NUNZIO: Let me just ask the one question and then I will stop.

THE COURT: All right. Ask the one question and we stop right there.

(IN OPEN COURT:)

THE COURT: Don't lead the witness.

MR. NUNZIO: Yes, Your Honor.

BY MR. NUNZIO:

Q Will you tell us, Mrs. Mayes, why you made these statements to the defendant during the course of the sexual act, why you told him the police were outside and that cars were out there?

A I thought it would make him stop.

MR. NUNZIO: No further questions.

MR. IANNI: Your Honor, I didn't hear that answer.

THE COURT: Just a moment. I told you we were stopping the examination right there. I am exercising the Court's discretion.

Read back the answer for the benefit of counsel.

And you are excused from the stand, Mrs. Mayes.

(The last question was read by the reporter.)

(The witness left the stand.)

THE COURT: We will take a ten-minute recess.

(Whereupon at 11:20 a.m. a recess was taken.)

(Whereupon at 11:40 a.m. the following proceedings were had out of the presence of the jury.)

THE COURT: Is there a preliminary?

MR. NUNZIO: Yes, Your Honor, if we may.

The Government proposes to proceed this way in view of the course of events, if Your Honor will allow it: The police responded, took the interview, took the information, took the complainant to the Sex Squad.

There came a time that they all left. She was home and then was called back at 3:00 o'clock because of a new chain of events that had started.

As the evidence will show, the defendant came onto the grounds.

My request of the Court is if I may just call the witnesses to keep a continuity of the case for that phase of the case with respect to what had transpired that morning, excuse them momentarily from the stand to be recalled, and put in the intervening witnesses very briefly, namely, that they had started the car, and then recall these officers back to the stand if I may.

It may confuse the jury if they were to give all the testimony at one time.

THE COURT: Who is your next witness?

MR. NUNZIO: It would be Sergeant Hall, the officer who received the report and called the police. It is very brief.

THE COURT: I don't see why you are worried about the order of the witnesses. Can't you handle it the way you stated?

MR. NUNZIO: I just didn't know whether the Court would allow me to break their testimony and say, "No further testimony at this time but subject to recall."

THE COURT: Yes, surely.

MR. IANNI: I have no objection, Your Honor.

MR. NUNZIO: Thank you very much, Your Honor.

MR. IANNI: If Your Honor pleases, I have prepared a motion for a subpoena of a witness, Mrs. Fushee.

(Subpoena handed to the Court.)

THE COURT: Before you go to the bother of serving that, is the Government going to call Mrs. Fushee?

MR. NUNZIO: She is not on the capital list, Your Honor.

The Government has no objection. The Government may examine her as well; but she is not on the capital list.

MR. IANNI: I have no objection. If he will get her here; I won't issue this subpoena.

MR. NUNZIO: I would prefer that counsel would proceed in view of the facts, Your Honor.

THE COURT: All right.

(Subpoena was executed by the Court.)

THE COURT: All right. Let us bring the jury in again and go ahead.

(Whereupon, at 11:43 a.m., the jury returned to the courtroom and the following proceedings ensued.)

MR. NUNZIO: Call Sergeant Hall to the stand, please.

Whereupon,

RYLAND G. HALL,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Would you state your name and your occupation, sir?

A I am Sergeant Ryland G. Hall. I am a Sergeant on the Security Force at St. Elizabeths Hospital.

Q How long have you been on the Security Force at St. Elizabeths Hospital, sir?

A Since 1961.

Q What were your duty hours, sir, if you know, on January 22nd, 1967?

A I was on the midnight shift, from 12:00 to 8:00 a.m.

Q This is 8:00 a.m. on the 22nd of January 1967?

A Yes, sir.

Q I am going to direct your attention, sir, to sometime after 7:00 o'clock on the morning of January 22nd, 1967. Did anything unusual happen at that time that you can recall?

MR. IANNI: Objection, Your Honor. I think that this witness should be able to justify as to time.

THE COURT: Well, this is only a preliminary question to get it in its perspective and then go ahead with the direct questions.

MR. IANNI: The trouble is, Your Honor, I think the time will become an important factor.

THE COURT: All right. He just said sometime after 7:00 o'clock. It is so vague that you don't have to worry about it.

MR. NUNZIO: I will rephrase the question, Your Honor.

BY MR. NUNZIO:

Q During the course of your shift of duty, sir, that is from midnight to 8:00 o'clock on the 22nd of January, 1967, you were on duty that date; is that correct?

A Yes, sir.

Q Did anything unusual happen during the course of your tour of duty that day, sir?

A Yes, sir, it did.

Q Approximately what time were you first apprised or aware of something that had happened?

A At 7:35 a.m.

Q How did this information come to you, sir, of this unusual event?

A I was patrolling in the hospital scout car and I received a radio call from the officer at No. 1 Gate, Officer Rice.

Q All right. Now, as a result of this call that you received, sir, where, if any place, did you go?

A I was instructed to go to the Geriatrics Supervisor's Office and see acting supervisor, Miss Elizabeth Fushee.

Q Did you in fact go to see the acting supervisor, Miss Fushee?

A Yes, I did.

Q Do you know one Mrs. Luella Mayes?

A Yes.

Q Was she an employee, sir, to your knowledge at the hospital at that time?

A Yes, sir.

Q On that occasion when you went to see Miss Fushee, did you see Mrs. Mayes there at that time?

A I did.

Q Did you have a conversation with anyone there at that time, yes or no?

A Yes, I did.

Q Listen to this question carefully: With whom did you have a conversation at that time?

A I had a conversation with the acting supervisor, Miss Fushee and also the assistant director of nursing on duty, Miss Sharon Olson.

Q Was Mrs. Mayes there at that time?

A Mrs. Mayes was in the office at that time.

Q As a result of these conversations, what, if anything, did you do?

A As a result of the conversation, I called Metropolitan Police.

Q Did the police respond to your call, sir?

A Yes, sir, they did.

Q Did you know the police officers that did respond to your call?

A Detective Cass ar l Detective Upright.

MR. NUNZIO: No further questions of this witness.

MR. IANNI: No questions; Your Honor.

THE COURT: Is this witness subject to recall?

MR. NUNZIO: No, Your Honor. We would ask that he be excused.

THE COURT: Very well.

Thank you, Sergeant Hall.

(The witness left the stand.)

MR. NUNZIO: Call Detective Cass to the stand, please.

Whereupon,

MELVIN R. CASS,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q State your name and your duty assignment, sir.

A Detective Melvin R. Cass, assigned to the Criminal Investigation Division at the 11th Precinct.

Q Is St. Elizabeths Hospital within that precinct, sir?

A Yes, sir.

Q How long have you been with the Criminal Investigation Unit of that Precinct, sir?

A About four years.

Q Were you so assigned on January 22nd, 1967?

A Yes, sir.

Q Were you working on that date, sir?

A Yes.

Q What was your tour of duty on January 22nd, 1967?

A From 8:00 in the morning until 4:00 p.m.

Q Did you in fact go to work that day?

A Yes, sir.

Q During the course of your duty on the morning of January 22nd, 1967, did you have occasion to go to St. Elizabeths Hospital?

A Yes, sir.

Q Of your own initiative, sir, or for other reasons?

A For other reasons.

Q Had you received a call?

A Yes, sir.

Q As a result of this call, sir, did you go to the hospital?

A Yes, I did.

Q Whom, if anyone, did you see when you got to the hospital?

A I seen a lady named Mrs. Mayes.

Q Whom, if anyone else, did you talk to, sir?

A I seen Sergeant Hall of the Guard Force of the St. Elizabeths Hospital.

Q Approximately what time was it, sir, that you talked to Mrs. Mayes?

A 8:00 a.m.

Q What time had you arrived at work then, sir, on the morning of January 22, 1967?

A At 7:30.

Q Do you recall, sir, what time it was when you received the call at the precinct?

A Just before 8:00.

Q What was the subject matter of the run to the hospital, sir, as a result of the call?

A I was called there to investigate an alleged sexual assault on one of the persons who worked there.

Q Now, after you had talked to Mrs. Mayes, sir, whom, if anyone else, did you talk to? If you know; if you don't know, just tell us.

A I don't know.

Q What, if anything, did you do, sir, after you had talked to Mrs. Mayes?

A After I talked to Mrs. Mayes, I called Detective Perry of the Sex Squad and informed him of the report that she gave me.

Q Did they respond to your call?

A They asked me to bring her to the office of the Sex Squad, which I did.

Q How was she transported to the Sex Squad, sir?

A In our cruiser.

Q When you arrived at the Sex Squad, sir, whom, if anyone, did you see with Mrs. Mayes? Let me rephrase the question.

Did you take her to Detective Perry?

A Yes, I did.

Q Was Detective DeMilt there at the time?

A Yes, he was.

Q Now, what if anything did you do, sir, after you had taken Mrs. Mayes to the Sex Squad?

A After I had taken her there, we left and went back to to the precinct and began to look for an automobile which she had given us a partial description of in the area.

Q What kind of a description of an automobile, sir, had she given to you?

A. She had given us a description of a white, small Ford.

MR. NUNZIO: No further questions of this witness at this time, Your Honor, although the Government will have the witness subject to recall.

THE COURT: Is there any cross-examination?

MR. IANNI: No cross-examination, Your Honor.

THE COURT: You are subject to recall, Detective, so stand by, would you.

THE WITNESS: Yes, Your Honor.

(The witness left the stand.)

Whereupon,

ROY A. PERRY,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Would you state your name and your duty assignment, sir?

A Detective Roy A. Perry, assigned to the Sex Squad, Metropolitan Police Department.

Q And how long have you been so assigned, sir?

A Approximately two years.

Q What were the hours of your duty assignment on the 22nd of January, 1967?

A I was working day work, 8:00 to 4:00 p.m.

Q What time had you come on duty that day, sir?

A 7:30 in the morning.

Q Did you have occasion to talk to Detective Cass at No. 11 Precinct that morning, sir?

A Yes, I did.

Q To your knowledge, where was Detective Cass calling from, sir?

A St. Elizabeths Hospital grounds.

Q Now, do you know one Luella E. Mayes?

A Yes, sir.

Q Did you have occasion to see her on the 22nd of January, 1967, sir?

A Yes, sir.

Q Where did you see her and approximately what time did you see her?

A I saw her in the office of the Sex Squad at about 9:30 or 9:45 a.m.

Q Now, who was present at the time that you saw Mrs. Mayes, sir?

A Detective Cass, Detective Upright, Sergeant DeMilt,

and I believe Detective Sergeant Plath of our office.

Q Now, as a result of having seen Mrs. Mayes, what if anything did you do?

A We began an investigation on the report that Mrs. Mayes had made to us and Detective Cass.

Q With respect to this investigation, sir, where if any place did you go?

A We, after interviewing her, went to the Scott Gas Station at Nichols and Lebaux in an attempt to interview a Jerry Aldrich.

Q Just answer yes or no: Did you see Mr. Aldrich at this time?

A No, sir.

Q What, if anything else, did you do?

A We retraced the route to St. Elizabeths Hospital grounds through which the defendant was alleged to have taken the complainant. We cruised the general vicinity for a short time in search of a white Ford Falcon which was supposed to have been used.

Q You say a white Ford Falcon, sir. How did you come by the information that it was a white Ford Falcon, sir?

A Through the complainant and her husband.

Q Where, if any place, was the complainant taken, sir, on that morning in addition to the St. Elizabeths grounds?

A 4600 block of Wheeler Road. I forget the exact address. I have it in my records here. We notified the scout cars to be on the lookout for this particular type car.

The scout car notified us they had a car parked in the rear of the 4600 block of Wheeler Road, and we responded with the complainant to view this car.

Q Was the complainant taken at any time, sir, to the hospital?

A Yes, sir.

Q Approximately what time was that, sir?

A Bear with me just a moment (perusing notes).

The patient arrived at the hospital at approximately 11:30 in the morning.

Q What, if anything, was taken from the complainant by the police in your presence, sir?

A Nothing.

Q With respect to the clothing worn by the complainant that morning, sir, what if anything was done with it, if you know?

A The complainant's clothing was turned over to us through the policewoman, Patricia Godwin who was present at the time of the examination at the hospital.

Q To your knowledge, sir, what items of clothing were turned over to the police by this police officer?

A Her suit, blouse, panties, slip, girdle and her brassiere.

Q By whom, if anyone, sir, were they marked, these items?

A Detective Sergeant DeMilt, I think, marked her property.

Q What, if anything, was done with these items of clothing, sir, by the police department?

A They were subsequently taken to the F.B.I. Laboratory.

Q Who took them to the F.B.I. Laboratory?

A By me and Sergeant DeMilt.

Q To your knowledge, after the complainant had been examined, where, if any place, was she taken then, sir?

A I think she was taken home after she was examined.

Q If your know, sir, approximately what time was it when the examination had been completed?

A I don't know.

MR. NUNZIO: Your Honor, I have no further questions of the witness at this time.

MR. IANNI: No questions, Your Honor.

MR. NUNZIO: May he be subject to recall, Your Honor?

THE COURT: Yes, he will be subject to recall.

Thank you, Detective.

(The witness left the stand.)

Whereupon,

JOSEPH B. HILL,

was called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Would you state your name, sir, and your occupation?

A Joseph B. Hill, Lieutenant, Security Force, St. Elizabeths Hospital.

Q How long have you been on the Security Force at St. Elizabeths Hospital, sir?

A I have been on the Security Force approximately 12 years.

Q What were your working hours, sir, on January 22nd, 1967?

A My tour of duty was from 8:00 a.m. until 4:00 p.m.

Q During your tour of duty, sir, did anything unusual happen during the course of the day?

A Yes. I arrived to work early that morning. I arrived there around 7:35 and as I approached No. 1 Gate, the guard informed me that Sergeant Hall was on an investigation at Geriatrics.

Q All right. Now, you had conversations with various people. As a result of these conversations that you had, sir, do you recall anything that happened on the afternoon of January 22nd, 1967?

A On the afternoon at 2:00 o'clock, I received a phone call from outside from Detective Cass, and he informed me that—

MR. IANNI: Objection, Your Honor.

THE COURT: Objection sustained.

BY MR. NUNZIO:

Q Don't tell us the conversation, sir. That is hearsay.

As a result of this conversation with Detective Cass, what did you do, sir?

A Well, we were doing our usual patrol of the grounds and keeping a close check of the area of the Geriatrics Service.

Q During the time that you were patrolling the grounds and keeping a close look on Geriatrics, what, if anything, unusual happened during the course of these travels, sir?

A Well, at 2:35, the guard at No. 3 Gate called scout car—

MR. IANNI: Objection, Your Honor.

BY MR. NUNZIO:

Q Don't tell us the conversation.

There was a conversation and as a result of the conversation, what did you do?

A As a result of the conversation involving a car, the guard at the gate observed the car after the information had been made known to him.

MR. IANNI: Objection, Your Honor.

MR. NUNZIO: No. I don't want you to testify as to what he saw.

THE COURT: Don't tell us what he said or say; just tell us what you did.

THE WITNESS: Well, that's when I took over, after I got a report from him.

BY MR. NUNZIO:

Q You got a report. What did you observe and what did you do?

A After I got a report from him, I observed a white 1964 Falcon parked on the Geriatrics parking lot that fit the description of a car that had been furnished to us, with a damaged front end.

Q A damaged what?

A Front end, front fender and the grill.

Q When you first observed this car, sir, where was it?

A It was parked on the Geriatrics parking lot near the Geriatrics Building.

Q Approximately what time was this, sir?

A This was approximately between 2:35 and 2:40 p.m.

Q To your knowledge, was anyone in that car at that time?

A Sergeant Hoffman was with me and as we approached there, there was a man laying down in the front seat. Sergeant Hoffman stayed and kept the car under surveillance, at which time—

MR. IANNI: Objection.

BY MR. NUNZIO:

Q He stayed there?

A That's right.

Q What did you do?

A I went back to No. 1 Gate and called No. 11 Precinct and reported the incident to them, that the car was on the grounds that met the description that had been furnished to us.

Q Who remained behind with the car under observation, sir?

A Sergeant Hoffman; Paul E. Hoffman.

Q After you had placed the call, sir, what, if anything, did you do?

A I went back and stayed with Sergeant Hoffman until No. 1 waited at No. 1 Gate until Detective Cass arrived and I escorted him to the Geriatrics parking lot where the car was parked.

Q Did you see Sergeant Hoffman at this time?

A At this time, he was still in the area of the car.

Q Was this a marked car, sir, the car that Sergeant Hoffman was in?

A It's a U.S. Interagency Motorpool car that we use, sir. It has no unusual marks.

Q Who, if anyone, responded with Detective Cass, if you know?

A With Detective Cass was Detective Wesley and, later on, Officer Rice from No. 11 came up.

Q What, if anything else, did you do, sir, once Detective Cass came?

A Well, after Detective Cass came and observed the man in the front seat, we had nothing more to do with it. It was taken out of our hands.

Q What position was the man in, sir, in this white Ford Falcon when you returned?

A When we returned, he was in a laying position. He was sitting under the steering wheel, laying over to his right in a laying position in the front seat.

MR. NUNZIO: No further questions of this witness, Your Honor.

## CROSS-EXAMINATION

BY MR. IANNI:

Q Did you say he was in a laying position?

A In a laying position, to his right side; that's right.

Q Were his feet on the seat?

A No, his feet were not on the seat; they were on the floor.

Q Was his head on the seat?

A I wouldn't say it was all the way down in the seat.

Q You could see him from the outside of the car?

A We pulled up by the car and he was in a laying position. I wouldn't say his head was right down on the seat.

Q He would be as anybody would appear who was just sitting there waiting for somebody; isn't that correct?

A Well, it's a usual procedure at St. Elizabeths when we see anyone laying around in a car, we usually check them out.

Q Right. What I am trying to point out, he wasn't trying to hide from anybody; was he?

A As far as I know, he wasn't trying to hide from anyone.

MR. LANNI: No further questions.

MR. NUNZIO: May the witness be excused, Your Honor?

THE COURT: Yes.

You may step down.

(The witness left the stand.)

Whereupon,

## PAUL E. HOFFMAN,

was called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

### DIRECT EXAMINATION

BY MR. NUNZIO:

Q Would you state your name, sir, and your occupation?

A Paul E. Hoffman, Supervisor, Guard Force, St. Elizabeths Hospital.

Q How long have you been a member of the Guard Force at St. Elizabeths Hospital?

A Approximately eight years.

Q Were you on duty on January 22nd, 1967?

A I was.

Q What was your tour of duty on that day, sir?

A I was on duty from 8:00 to 4:00, sir.

Q I want to direct your attention to the afternoon hours during your tour of duty, sir. Just answer the questions as they are directed to you.

Did you have occasion to talk to Lieutenant Hill?

A I did; yes, sir.

Q As a result of these conversations, sir, what if anything did you do?

A Well, will you—

Q Let me rephrase the question.

Were you operating on foot, sir, or by car?

A Well, we was assigned to the scout car.

Q All right, sir.

With respect to the grounds at St. Elizabeths Hospital, did you have occasion to be in the area of the Geriatrics?

A I was.

Q What, if anything, did you see on the afternoon of the 22nd of January with respect to the Geriatrics area?

A At that particular time, about 2:35 p.m., we saw a car which we was notified to be on the lookout for.

Q What type of description of car was it, sir?

A This car was a white Falcon.

Q Where was the car, sir, when you first observed it?

A On the Geriatrics parking lot.

Q To your knowledge, was there anyone inside that car at the time you first observed it?

A Yes, sir, there was.

Q What, if anything, did you do, sir, when you saw this car parked at Geriatrics?

A I kept the car under surveillance while Lieutenant Hill went to notify the Metropolitan Police Department.

Q During the time Lieutenant Hill left, did anyone leave that automobile and return to it, or did anyone else get into the car?

A No, sir.

Q Were you present when Lieutenant Hill returned?

A Yes, sir.

Q To your knowledge, if you know, did he return with anyone else?

A No, sir.

Q Where did Lieutenant Hill return, when he did return?

A He returned to the scout car with me on the Geriatrics parking lot.

Q To your knowledge, did the police arrive on the scene while you were present there?

A Yes, sir.

Q During the time that you were with Lieutenant Hill observing this area, did anyone leave that vehicle until the police arrived?

A No, sir.

Q You say it was 2:35 that you observed this white car?

A About 2:35, we received a call from Officer Jackson.

Q You had a call from Officer Jackson at 2:35?

A Yes, sir.

Q When did you first see this car with respect to that time?

A Somewheres around 2:40 approximately 2:40 p.m.

MR. NUNZIO: No further questions, Your Honor, of this witness.

## CROSS EXAMINATION

BY MR. IANNI:

Q. Mr. Hoffman, was there anybody else in or about the area where the car was?

A Not at that time; no, sir.

Q Well, did there come a time that somebody was nearby washing a car?

A There was a car washer within, I would say, about 40 feet of it.

Q And it is a fact, is it not, Mr. Johnson got out of that car and went over and talked to the car washer?

A No.

Q You didn't see that?

A No, I didn't see that.

Q But, there was a car washer within 40 feet of his car, right?

A That's right.

Q Do you know whether Mr. Johnson talked to him even out of the window of his car?

A I don't know, sir.

Q You don't know.

You said you are the supervisor of the security guards there?

A That is right.

Q Now, how is it that someone leaves St. Elizabeths, the area where this car was and where Mrs. Mayes worked on that day, and go onto Nichols Avenue?

A What was that, sir?

Q How do they leave the grounds of St. Elizabeths and go onto Nichols Avenue?

A Well, they can leave several different ways. They can go out No. 3 Gate or go out No. 4 Gate.

Q Are either of these gates controlled by traffic signal device?

A No. 4 Gate now is controlled by a traffic signal.

Q Back on January 22nd, 1967, were either one of these controlled by any traffic signal device?

A No. 4 Gate was.

Q No. 4 Gate was.

Now, is there a security guard that stands near—or on this particular day that stood near No. 4 Gate?

A There is a security guard on duty at No. 4 Gate.

Q As I recall correct me if I am wrong—from the grounds of St. Elizabeths, to get to Nichols Avenue at No. 4 Gate, you have to go up a grade; is that not correct?

A That is at No. 3 Gate.

Q That is at No. 3 Gate.

A Right.

Q Did that light which controlled the traffic there work at all times?

A The No. 3 Gate—

THE COURT: Excuse me. Before you answer, Officer. Would you come to the Bench, gentlemen.

(AT THE BENCH:)

THE COURT: You are completely on new material. Are

you making him your witness? This has nothing to do with anything he brought out on direct examination.

MR. IANNI: It goes to the credibility of the complaining witness.

THE COURT: That is stretching the point. You are trying to counterbalance her story. It is going to her credibility, not his.

MR. IANNI: It goes to the credibility of the Government's case.

THE COURT: On the basis of this, you are making him your witness.

MR. IANNI: Can we take him now, Your Honor?

THE COURT: I don't care. All I am saying is you are making him your witness.

MR. IANNI: All right, Your Honor.

(IN OPEN COURT:)

BY MR. IANNI:

Q On January the 22nd, 1967, did the traffic signal device work at all times?

A At which gate, No. 4 Gate?

Q No. 4 Gate.

A I guess it did. We never received any word otherwise.

Q Now, would you also tell us what were the duties of the guard that was on duty?

A Well, the man on duty at the gate, he has to observe traffic going in and out of the gate to assist the public and to maintain security at St. Elizabeths Hospital.

Q Did he have anything particular to do when he saw somebody approaching the gate from inside to leave?

A Yes. He is to consult the person to see if they are a patient or visitor, or otherwise.

MR. IANNI: I have nothing further of the witness, Your Honor.

## REDIRECT EXAMINATION

BY MR. NUNZIO:

Q To your knowledge, sir, who was on duty at Gate No. 4 on the 22nd of January, 1967, on that tour of duty?

A No. 4 Gate, I don't know, sir.

Q Now, with respect to the traffic signal located right at that gate, sir, assuming at that time the traffic signal was green, sir, is it possible for a car to drive off the grounds and keep going straight ahead without stopping because of that signal?

A It is possible; yes, sir.

Q In other words, there is no toll gate there?

A There are no toll gates there or anything, anybody can run in and out.

Q In other words, vehicles can drive straight out?

A They can drive straight out without being questioned, yes.

Q Can a person drive straight out without being stopped by the guard?

A That's right.

MR. NUNZIO: No further questions.

RECROSS EXAMINATION

BY MR. IANNI:

Q On January 22nd, did this gate have one of those devices that you see so many places where the light remains one color on Nichols Avenue all the time until somebody goes over something on the perpendicular street that changes it?

A It does have a treadle affair.

Q It has a treadle?

A Yes.

Q Now, if one car came up and went across that treadle affair, would he have to stop?

A Well, it all depends on the control. When the car hits the treadle, it's time to change the light on the left.

Q And when the car hits the treadle, the light on Nichols Avenue would change from green to caution and then to red, is that right?

A That is right.

Q How far was that treadle from where the person would turn onto Nichols Avenue?

A Twenty or thirty feet.

MR. IANNI: Nothing further of the witness, Your Honor.

## REDIRECT EXAMINATION

BY MR. NUNZIO:

Q How far is the light from the treadle, sir? You say twenty to thirty feet from the street?

A That is right. What do you mean, the —

Q How far is the treadle that would set off the traffic light and change it?

A Well, it's about twenty or thirty feet.

Q From where I am to where you are, sir?

A Right.

Q A vehicle traveling through there and hitting the treadles standing out on Nichols Avenue, would the light be green, sir?

A It could be. It all depends on the timing.

Q If a person had knowledge of the treadle, sir, would that person that had struck the treadle know that by the time he got to the street, the light would be green?

A I couldn't say, sir.

Q Doesn't the treadle always operate the light on Nichols Avenue?

A No, sir; it's also a hand button on the post.

Q Except for stepping on the treadle, would the light remain red for anyone leaving St. Elizabeths grounds?

A No. It's a time device and it will change without anybody —

Q In other words, it has an automatic device that doesn't have to be set off by the treadle, isn't that right?

A That is right.

MR. NUNZIO: No further questions, Your Honor.

THE COURT: Thank you, sir. You may step down.

(The witness left the stand.)

THE COURT: We will recess at this time until 1:45.

Ladies and gentlemen of the jury, don't talk about the case and don't let anyone talk to you about it.

(Whereupon, at 12:25 p.m., the trial in the above-entitled matter was recessed until 1:45 p.m., the same day.)

AFTERNOON SESSION

1:50 P.M.

MR. NUNZIO: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. NUNZIO: I call Doctor Chin to the stand, please.

Whereupon,

DR. WILLIAM CHIN,

was called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q If you will, sir, state your full name and your occupation.

A My name is William Chin. I presently am a medical resident at D.C. General Hospital.

Q How long have you been a medical resident at D.C. General Hospital, sir?

A Eight months.

MR. IANNI: Your Honor, I will stipulate to Doctor Chin's qualifications as an expert.

THE COURT: Very well.

MR. NUNZIO: Thank you.

BY MR. NUNZIO:

Q Dr. Chin, I want to direct your attention to the 22nd of January, 1967, sir. Did you have occasion to examine one Luella Essie Mayes on that date, sir?

A Yes, I did.

Q Approximately what time was it, sir, that you examined her?

A Approximately 11:00 o'clock.

Q With respect to this examination, sir, did you have occasion to take any smears at that time?

A Yes. At that time, I performed a urethral and cervical smear.

Q What, if anything, did you do with the smears that were taken, sir?

A. At this time the smears were taken by the nurse and transferred to the pathology department.

Q. The smears were made by you, is that correct?

A. That is correct.

Q. Approximately what time was it, sir, when you conducted this examination?

A. Approximately 11:00 o'clock, sir.

Q. 11:00 o'clock?

A. Yes.

MR. NUNZIO: No further questions of the Doctor, Your Honor.

MR. IANNI: The Court's indulgence just a moment, please.

(Short pause in proceedings.)

MR. IANNI: Is it possible for us to excuse the Doctor at this time and ask him to remain until the next witness testifies. I believe the next witness is also a medical witness. And if I would want to call him, maybe Your Honor would allow me to call him after the next witness has testified.

THE COURT: Very well.

You are excused, Doctor, but don't leave the courthouse until the next witness testifies.

MR. NUNZIO: Doctor Perry, please.

Whereupon,

## DR. SOPHIA PERRY,

was called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. NUNZIO:

Q. Would you state your name and your occupation, ma'am?

A. My name is Sophie Perry. I am a physician and I am acting director of the laboratory at D.C. General Hospital.

Q. Is that in the pathology department of D.C. General Hospital?

MR. IANNI: I will stipulate, Your Honor, her qualifications as an expert.

THE COURT: Unless you wish to expand on them, we will consider her qualified.

MR. NUNZIO: No, Your Honor, I don't wish to. I will accept the stipulation of counsel.

THE COURT: Very well.

BY MR. NUNZIO:

Q Doctor Perry, did you have occasion to examine some slides taken by Doctor Chin on the 22nd of January, 1967?

A Yes, I did.

Q Approximately how many slides were sent to pathology, Doctor?

A Two.

Q Do you have the slides with you, Doctor?

A Yes.

Q How are the slides so marked, Doctor?

A They have been engraved and there is Doctor Chin's name on one side and the patient's name on the other side, which is Luella Essie Mayes.

MR. NUNZIO: Your Honor, may these two slides be marked as Government's Exhibits 9 and 9-A for identification?

THE COURT: Are these going back to the hospital records, Doctor?

THE WITNESS: Yes.

THE COURT: Can we consider them deemed marked so we won't damage these slides?

MR. NUNZIO: Yes.

THE COURT: They will be deemed marked.

MR. NUNZIO: Thank you very much, Your Honor.

(Slides were deemed marked Government's Exhibits 9 and 9-A for identification.)

BY MR. NUNZIO:

Q Doctor, I show you what has been marked as Government's Exhibits 9 and 9-A—let's just make them both 9. Have you examined those slides, Doctor?

A Yes.

Q How were they examined by you?

A Microscopically.

Q With respect to those slides, what if anything can you tell us concerning those slides?

A Well, an examination revealed there is presence of spermatozoa, sperm, in other words, which indicates that an intercourse had taken place.

Q Do the slides reflect a presence of spermatozoa on them?

A Yes.

Q Do the slides indicate, Doctor, where the smears were taken from on the physical person of Mrs. Mayes?

A I beg your pardon?

Q Do these slides reflect of what part of the anatomy the smears were taken?

A They were taken from the internal genital organs.

Q What does the indication of spermatozoa on the slides reflect?

A The indication is that an intercourse had taken place.

Q The spermatozoa being the discharge of a male, is that correct?

A That is right.

MR. NUNZIO: No further questions.

CROSS-EXAMINATION

BY MR. IANNI:

Q Doctor, how far in the past could this intercourse have taken place?

A Within 24 hours.

Q Within 24 hours.

But you cannot narrow it. It could be as much as 24 hours, is that correct?

A That is right.

Q And you didn't actually examine Mrs. Mayes, you only examined the slides that Doctor Chin turned over to you; is that correct?

A That is all.

MR. IANNI: I have nothing further of the witness, Your Honor.

MR. NUNZIO: Thank you, Doctor.

(The witness left the stand.)

THE COURT: Do you want to call Doctor Chin back?

MR. IANNI: I would call him for one question, Your Honor. I would call him as my witness.

THE COURT: All right.

Call Doctor Chin.

MR. NUNZIO: Your Honor, may these slides be released so they may be returned to the hospital?

THE COURT: Any objection?

MR. IANNI: I have none, Your Honor.

THE COURT: All right. They may be returned.

Whereupon,

DR. WILLIAM CHIN,

resumed the witness stand and testified further as follows:

CROSS-EXAMINATION

BY MR. IANNI:

Q Doctor Chin, you examined Mrs. Mayes on January 22nd, 1967, did you not?

A That is right.

Q And you conducted your examination on the basis that you had been informed that she had been sexually molested, is that correct?

A That is right.

Q And did you examine those parts of the body that one would normally examine when a sex act was committed on someone?

A Correct.

Q Did you find any bruises on Mrs. Mayes?

A As far as I can remember and as far as the records show, there was no evidence of any abrasions or bruises.

Q Would that also include her privates, her vagina?

A It would.

MR. IANNI: I have nothing further, Your Honor.

REDIRECT EXAMINATION

BY MR. NUNZIO:

Q Doctor, would it normally reflect bruises on the privates area if a woman had been raped?

A There would not necessarily be any trauma there.

MR. NUNZIO: No further questions.

RECROSS-EXAMINATION

BY MR. IANNI:

Q Doctor, however, if she put up a struggle—

MR. NUNZIO: Objection.

BY MR. IANNI:

Q You have examined people in the past that have been sexually molested and have found bruises on them, have you not?

A I have in the past, yes.

Q Is it normal to find bruises on a victim in a rape case?

A I don't think I can honestly answer that question.

MR. IANNI: Nothing further of the witness, Your Honor.

MR. NUNZIO: Nothing further, Your Honor.

THE COURT: Thank you, Doctor.

MR. NUNZIO: May the Doctor be excused, Your Honor?

THE COURT: Yes.

(The witness left the stand.)

MR. NUNZIO: Recall Detective Cass to the stand, please.

Whereupon,

MELVIN R. CASS,

called as a witness on behalf of the Government, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Detective Cass, you are reminded that you are still under oath at this time.

Again directing your attention to January 22nd, 1967, sir, did you have occasion to be at St. Elizabeths Hospital on the afternoon of that date?

A Yes, sir.

Q What occasioned your returning to St. Elizabeths Hospital on the afternoon of that date, sir?

A I received a call that the car in this case that we were looking for had entered the grounds.

Q What if anything did you do, sir, when you received this information?

A I went to the grounds.

Q Were you going alone, sir, or with someone?

A Well, I was with Detective George Wesley.

Q Approximately what time was it, sir, when you received this information concerning the car?

A Around 2:45 p.m.

Q Approximately what time was it, sir, that you arrived at the hospital grounds?

A About five minutes later.

Q What if anything did you observe, sir, when you got to the hospital grounds?

A I observed a car fitting the description of the one that Mrs. Mayes gave us.

Q Where was this car, sir?

A It was parked on the parking lot near where Mrs. Mayes' car was parked.

Q With respect to Mrs. Mayes' car, sir, would you tell us the relationship to each other, that is, by way of position these two cars were?

A Yes. The defendant's car was parked approximately two cars in front of Mrs. Mayes' car.

Q What if anything did you do, sir, when you got to the grounds and observed this car?

A I observed a man lying across the front seat.

Q Exactly how was he lying across the seat, sir, if you know?

A Yes. He was lying in a relaxed position with his legs stretched across the seat and his head against the car window.

Q Against the car window?

A The car door where the window comes up.

Q Who were you with at this time, sir, when you observed this person in the car?

A Detective Wesley.

Q Did you have occasion to see Lt. Hill or Sgt. Hoffman, at that time?

A Yes, they came there.

Q What if anything did you do, sir, once you had observed this Ford? I take it; it was a Ford; is that correct?

A Yes.

Q Would you describe the car again that you observed?

A Yes, sir. A 1960 white Ford Falcon.

Q What, if anything, did you do, sir?

A I asked the gentleman lying in the front seat I identified myself and asked him to identify himself. He stepped out of the car and identified himself.

Q All right. Prior to the time that you had approached this car with this individual in it, what if anything did you do before you left the precinct?

A I asked a scout car to go by and pick Mrs. Mayes up and bring her to where that car was located.

Q At the time that you approached this individual in the car, if you know, was Mrs. Mayes on the scene?

A No.

Q You testified that individual stepped out of the car, is that correct?

A Yes.

Q Was he ordered out of the car by you?

A No, sir.

Q To your knowledge, did Mrs. Mayes ever come to the scene?

A Yes, she did.

Q When did she come on the scene, sir?

A Very shortly after he had stepped out of the car.

Q Was there a confrontation between the complainant Mrs. Mayes and this individual in the car?

A Between the complainant—

Q And the individual sitting in this car.

A No, not at that time.

Q Did there come a time when a confrontation did take place? Did she identify him in any way to you?

A Yes, she did.

Q When was that?

A That was as soon as she arrived on the scene. She pointed him out and said, "That is the man."

Q Do you see the individual in court today that was seated in that car?

A Yes, sir, I do.

Q Would you identify him for us, please? Where is he?

A He is sitting right at that table (indicating).

MR. NUNZIO: Your Honor, may the record show that he has identified the defendant in this case?

THE COURT: The record will so indicate.

BY MR. NUNZIO:

Q Whom, if anyone, sir, placed the defendant under arrest?

A Detective Wesley told the defendant that he was under arrest.

Q This is the officer who was with you at the time, is that correct?

A Correct.

Q Was there any search made at this time?

A Yes.

Q What was searched, sir?

A I searched the car.

Q Was the defendant present at the time the car was searched?

A Yes, he was.

Q What if anything, sir, did you find in that car?

A I found a pair of white ladies gloves behind the passenger's side of the front seat on the floor.

Q By whom if anyone, sir, were these gloves identified?

A They were identified by Mrs. Mayes as hers.

Q I show you, sir, what has been marked and has been moved into evidence as Government's Exhibit No. 7. Can you identify these for us, sir?

A Yes. (Perusing exhibit.)

I placed my initials on the inside of the gloves.

Q Do you see your initials inside there, sir?

A Yes, I do.

Q What are the initials?

A "M.C."

Q What if anything else, sir, was turned over to you at the time of the arrest?

A A set of car keys.

Q From whom if anyone, sir, did you receive these keys?

A The defendant reached in his pocket and he gave me those keys.

Q I show you what has been marked as Government's Exhibit No. 8, sir. Can you identify these for the ladies and gentlemen of the jury?

A They look like the keys that he gave me.

Q What if anything did you do with these keys after they were turned over to you, sir?

A I placed them in that envelope with the gloves.

Q To whom, if anyone, was this envelope surrendered, sir?

A It was surrended to Detective Perry of the Sex Squad.

Q Now, you had seen Detective Perry and Sergeant De Milt that morning, is that correct?

A That is correct.

Q Did you again see them that afternoon subsequent or after the arrest?

A I did not.

Q If you know, sir, where was the defendant transported to after the arrest was made by Detective Wesley?

A Yes. He was transported to No. 11 Precinct by us and then transported to the Sex Squad in the patrol wagon.

Q Directing your attention, sir, to the morning when you originally responded to St. Elizabeths Hospital and talked to Mrs. Mayes: What if anything was given to you at that time, sir, by Mrs. Mayes?

A Mrs. Mayes gave me a piece of an envelope that had the name "Charles" and a phone number written on it.

Q What if anything did you do with this piece of paper, sir, if you can recall?

A I gave it to Detective Perry at the Sex Squad.

Q To your knowledge, sir, do you know where this piece of paper is today?

A I do not.

MR. NUNZIO: The Court's indulgence, please.

(Short pause in proceedings.)

BY MR. NUNZIO:

Q To your knowledge, do you know the tag number of the car in which the defendant was sitting on that afternoon in question?

A I do not.

Q And everything that you have testified to, sir, took place here in the District of Columbia?

A It did.

MR. NUNZIO: No further questons, Your Honor.

CROSS-EXEMINATION

BY MR. IANNI:

Q Detective Cass, did Detective Wesley place Mr. Johnson under arrest before Mrs. Mayes came on the scene?

A He placed him under arrest at the time that she identified him.

Q Had you found the gloves before that time, sir?

A No.

Q Now, you say he was laying down when you first observed him?

A He was lying across the seat, yes.

Q Were his feet on the floor?

A They were hanging over, yes.

Q Hanging over?

A Right.

Q Was his head touching the seat?

A His head was not down on the seat.

Q He was kind of sitting in a manner that anybody might sit that was just waiting for somebody, is that right?

A He was sitting in a relaxed position.

Q Now, immediately you confronted him and asked him if he was the fellow who had pushed that car in there, is that correct?

A I asked him if he had pushed that car; yes, sir.

Q And he told you he had?

A He did.

Q And did you search his car?

A I made an immediate search of the immediate area, yes.

Q Well, I mean, did you search the car itself?

A I did.

Q And in his car, in addition to other things that you found, you found a pair of what they call commercial cables; is that correct?

A I don't understand that.

Q Well, you know the type of cables that people use nowadays to run from the battery of another car to start a car. Well, you found a pair of cables, did you not, in his car?

A I don't recall finding a pair of cables.

Q You don't recall finding cables?

A No, sir.

Q Do you recall whether or not you had found the gloves before Mrs. Mayes came on the scene?

A When she came on the scene, that's when I searched the car, after she had identified him and that is when I found the gloves.

Q Were the gloves on the driver's side of the car or on the passenger's side?

A The passenger's side.

Q And do you recall if his car had standard transmission or automatic transmission?

A I do not.

Q Do you recall when you got to this area that there was somebody close by washing an automobile?

A No, I don't.

MR. IANNI: Nothing further of the witnesses, Your Honor.

## REDIRECT EXAMINATION

BY MR. NUNZIO:

Q Counsel asked you if he admitted pushing this car, is that correct?

A That is correct.

Q What else did he say at that time?

A He said that she had given him a set of keys and he told her that he would come back at 3:30 and help her start her car.

Q Were there any statements made by the defendant concerning the presence of the complainant in his car?

A Yes, sir. He said that she had not been in his car.

MR. NUNZIO: No further questions, Your Honor.

MR. IANNI: I have no further questions, Your Honor.

THE COURT: Thank you, Officer.

(The witness left the stand.)

MR. NUNZIO: We will call Detective Wesley, Your Honor.

Whereupon,

GEORGE R. WESLEY,

was called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

THE COURT: May I ask counsel to come to the Bench a moment?

MR. NUNZIO: Yes, Your Honor.

(AT THE BENCH:)

THE COURT: I think you referred to the gloves as No. 7, I think—

MR. NUNZIO: Yes.

THE COURT: And No. 8 as the keys.

MR. NUNZIO: Yes, Your Honor.

THE COURT: I think you referred to them as admitted in evidence.

MR. NUNZIO: As I understood, 1 through 6 are in evidence.

THE COURT: Yes. But 7 and 8 are not.

MR. NUNZIO: That is correct, Your Honor.

(IN OPEN COURT:)

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Would you state your name, sir, and your occupation?

A George R. Wesley, policeman, Metropolitan Police Department.

Q And you are a detective, is that correct, sir?

A Yes, sir.

Q What precinct are you with, sir?

A I am assigned to the Criminal Investigation Division, detailed to the 14th Precinct.

Q Were you on duty on the 22nd of January, sir, 1967?

A I was, sir.

Q Who was your partner on this date, sir, if you had one?

A Detective Cass.

Q Detective Wesley, did you have occasion to be at the St. Elizabeths Hospital on the afternoon of the 22nd of January, 1967?

A I did, sir.

Q On that date, sir, were you with Detective Cass that afternoon?

A I was, sir.

Q When you went to the hospital, sir, what if anything did you do?

A Well, we met the guard at the 4th gate of St. Elizabeths and at that particular time, he carried us to the Geriatrics Building located on the grounds of St. Elizabeths.

Q What if anything did you see there when you got to the Geriatrics Building, sir?

A When we approached the parking lot, we observed a 1960 white Falcon bearing D.C. tags 287-570.

Q What kind of car was it, sir?

A A 1960 Falcon.

Q What color was it, if you know?

A White.

Q Was the car occupied at that time, sir, if you know?

A It was, sir.

Q What if anything did you do after you arrived there and after you searched this automobile?

A Approached the automobile and I asked the occupant for his identification.

Q Was there a confrontation—Strike that.

Do you know one Luella Mayes, sir?

A I met her that same afternoon.

Q You did not know her, then, before January the 22nd, 1967?

A No, sir, I did not.

Q On that date, did you meet one person known by the name of Luella Mayes?

A I did, sir.

Q Did you have occasion to see Mrs. Mayes that afternoon?

A I did, sir.

Q Did you have occasion to be present—Strike that.

To your knowledge, was the occupant of this 1960 white Ford, did this occupant leave the car and stand outside of that vehicle?

A Yes, sir, he did.

Q Were you present at this time?

A I was, sir.

Q Was there an identification made by Mrs. Mayes concerning an alleged sexual assault in your presence?

A There was, sir.

Q Did she identify anyone to you at that time?

A She did.

Q Do you see that person in the courtroom today?

A Yes, sir.

Q Would you identify him for us, please, as to where he is seated?

A That is Mr. Johnson who is seated to the right of his counsel.

MR. NUNZIO: Your Honor, may the record show he has identified the defendant in this case, Barrington Joseph Johnson?

THE COURT: The record will so indicate.

BY MR. NUNZIO:

Q Did you make the arrest of the defendant in this case?

A I did, sir.

Q To your knowledge, sir, was there a search of the vehicle made at that time?

A Yes, sir.

Q Who made the search of the vehicle, if you know?

A Detective Cass.

Q To your knowledge, sir, what if anything was recovered from this white Ford Falcon?

A A pair of white women's gloves.

Q To your knowledge, sir, what if anything was recovered from the person of the defendant at that time?

A A set of keys.

Q Where, if any place, sir, was the defendant transported after he was placed under arrest?

A He was transported to the Sex Squad.

Q To your knowledge, sir, what if anything happened to the defendant after he had been transported to the — Did you say to the Sex Squad?

A Yes, sir.

Q Who transported him to the Sex Squad?

A He was transported in a wagon.

MR. NUNZIO: No further questions of this witness, Your Honor.

CROSS-EXAMINATION

BY MR. IANNI:

Q Detective Wesley, when you got out there on January 22nd, 1967, in the afternoon, you left the car which you and Detective Cass were traveling in and you went over to this white 1960 Falcon, is that not correct?

A That is right, sir.

Q And you went over and you asked this man for identification.

A Correct, sir.

Q And he told you who he was.

A He did.

Q And after he told you who he was, you asked him if he didn't push that car that morning, is that correct?

A That is right, sir.

Q And he told you that he had pushed it, right?

A He did.

Q Now, all of this time, Detective Cass was still in the cruiser or the car that you people came in?

A No, sir, he was on the outside.

Q He was on the outside.

After he told you that he was the fellow who had pushed this car, you told him, "That woman said that the fellow who pushed her car raped her this morning"; is that correct?

A That is right, sir.

Q And he told you that he hadn't done anything like that to her.

A That's what he said.

Q All right. And you placed him under arrest then?

A Shortly after that.

Q Shortly after that. And you placed him under arrest before Mrs. Mayes came on the scene?

A That, I don't know, sir. The scout car had brought her up.

Q Well, Mrs. Mayes came on the scene sometime after you and Detective Cass were there, is that right?

A That is right, sir.

Q And this was about the only conversation that you had with Mr. Johnson, just what I have recited here, isn't it?

A That is correct, sir.

Q Did you search the car before Mrs. Mayes came to the scene?

A No, sir. I didn't search the car at all.

Q You didn't search the car at all.

Did Mr. Johnson offer you the car keys to his car and ask you to look in the trunk to see if there were jumper cables, battery cables in the trunk?

A No. That, sir, I don't remember.

Q You don't remember that?

A No, sir.

Q Did you look in the trunk of his car?

A No, I did not.

Q Did he tell you he came back to start her car?

A That's exactly what he told me.

Q Did he tell you how he was going to accomplish starting that car?

A I can't remember that.

Q You can't remember that?

A No, sir.

Q Well, did he ever tell you that?

A I remember him telling me that he came back to start the lady's automobile.

Q Well, you don't remember anything about battery cables or jumper cables?

A No, sir, I don't.

Q Did you know if there was someone close by that was washing their car from where his car was parked?

A An inmate from St. Elizabeths.

Q There was somebody close by who was washing a car?

A Yes, sir.

Q You never saw Mr. Johnson go over and talk to this fellow?

A No, sir.

MR. IANNI: The Court's indulgence a moment, please.

(Short pause in proceedings.)

MR. IANNI: I have nothing further of the witness, Your Honor.

## REDIRECT EXAMINATION

BY MR. NUNZIO:

Q Was there any conversation or any statement by the defendant to the effect as to whether the complainant, Mrs. Mayes, had been in his car or not on that morning?

A He stated that she had been in his automobile.

Q That she had, or had not?

A She had.

Q Do you recall when he said that?

A I don't remember.

MR. IANNI: Objection, Your Honor.

THE COURT: What is the objection?

MR. IANNI: Well, Your Honor —

MR. NUNZIO: I just asked if he recalled when.

MR. IANNI: I withdraw the objection.

BY MR. NUNZIO:

Q Was it at the scene there?

A Yes, sir.

MR. NUNZIO: No further questions.

THE COURT: Thank you, Detective.

(The witness left the stand.)

MR. NUNZIO: Call Detective Sergeant DeMilt to the stand, please.

Whereupon,

ROBERT F. DeMILT,

was called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Would you state your name, sir, and your occupation?

A Robert F. DeMilt.

Q And your occupation, sir?

A Detective Sergeant, assigned to the Metropolitan Police Department.

Q How are you presently assigned, sir?

A At present, I am supervisor of detectives at the 7th Precinct.

Q How were you assigned, sir, on the 22nd of January, 1967?

A I was investigator for the Sex Squad, Metropolitan Police Department.

Q Were you working on the 22nd of January, 1967, sir?

A Yes, sir.

Q Were you working alone or with someone?

A Yes, sir.

Q Who were you working with?

A Detective Roy A. Perry.

Q What were your duty hours on the 22nd of January, 1967?

A 7:30 a.m. to 4:00 p.m.

Q Did you have occasion, sir, to see one Mrs. Luella Mayes on the 22nd of January?

A Yes, sir.

Q Where did you see her?

A At the Sex Squad Office, Police Headquarters.

Q Did an interview take place?

A Yes, sir.

Q Approximately what time did the interview take place?

A Slightly after 9:00 a.m.

Q As a result of the interview with Mrs. Mayes, sir, what if anything did you do?

A I took her to D.C. General.

Q After you had taken her. Incidentally, sir, what time was it you took her to D.C. General?

A I arrived there approximately at 10:50 a.m. that morning.

Q Where, if any place else did you go with Mrs. Mayes?

A To the scene where she stated she was abducted, the route along to where she was attacked, the route back to where the subject had let her off at the initial point of the abduction.

Q Which gate, sir, did she take you to concerning the route out, if you know?

A Out was Gate 4.

Q And the route back was what, sir?

A Gate 3.

Q To your knowledge, where was Mrs. Mayes employed in January with respect to the buildings inside the hospital grounds?

A Geriatrics Building, Building 129, St. Elizabeths Hospital.

Q What was the approximate distance in blocks, sir

A Correction, the building was 119.

Q With respect to distance by way of blocks, sir, if you know, how many blocks was it from the Geriatrics Ward to Gate 4 going out, and as to the gate back to the Geriatrics Ward?

A The grounds at St. Elizabeths Hospital are not broken down in blocks similar to city blocks.

Q The distance in blocks, sir.

A From Gate 4?

Q From Gate 4 to Geriatrics.

A As the crow flies or as the road runs?

Q As the road runs.

There is a great difference. I would say roughly eight blocks.

Q What about the gate back to Geriatrics, sir?

A To Gate 4?

Q From the gate back to Geriatrics.

A That is what I was referring to, from the gate to Geriatrics.

Q I don't mean to confuse you or the jury or the Court. She said two routes were used, is that correct?

A Yes, sir.

Q The route she took when she left and the route she took when she came back.

A Well, she took me over two routes when she left.

Q Let me just rephrase the question this way, sir: Are they all straight roads in that general area?

A No, sir.

Q How would you describe the road conditions on the grounds of St. Elizabeths?

A They are all curved, obstructed by circles.

Q Where, if anywhere, was Mrs. Mayes taken after that, sir?

MR. IANNI: Objection.

MR. NUNZIO: I am merely asking if she was taken home, Your Honor.

THE COURT: You are not talking about the route now?

MR. NUNZIO: No, Your Honor.

MR. IANNI: I withdraw the objection.

MR. NUNZIO: Thank you, Mr. Ianni.

BY MR. NUNZIO:

Q Was she taken home sometime that day, sir?

A Yes, sir.

Q Approximately what time was it?

A It was well in the afternoon.

Q Did you have occasion to see Mrs. Mayes any other

time during the course of that day, sir?

A No, sir.

Q While Mrs. Mayes was at the hospital, sir, what if anything of her possessions were taken from her?

A All the clothing were turned over to me.

Q What clothing was it, sir?

A The entire attire she was wearing during the attack.

Q What, if anything, did you do with these items, sir, that were turned over to you?

A I marked them and my partner wrapped them, and both of us took them over to the Federal Bureau of Investigation Laboratory.

Q I am going to show you Government's Exhibits 1 and 1-A, sir. Can you identify these for us?

A Yes, sir.

Q Have you seen those before, sir?

A Yes, sir.

Q Where did you see them?

A They were turned over to me by D.C. General, Mrs. Mayes.

Q Is that the same suit that you turned over to the FBI Laboratory?

A Yes, sir. They are marked with my initials and they are marked by the agent I turned them over to, Robert Neill.

Q How was this suit wrapped, sir, at the time it was sent to the FBI?

A It was wrapped that afternoon at approximately 2:00 p.m.—to be exact, I finished wrapping it at 2:10 p.m. that afternoon because I went off at 2:10.

Q This is most important: With respect to the other bags before you, sir, would you examine them, please. Identify them, if you will, please first. The bag is marked, for simplicity's sake—there are two items in there—Exhibits 5 and 6 for identification and admitted in evidence.

Can you identify those for us, please?

A Yes, sir. Exhibit 5 was turned over to me by Mrs. Mayes and it was marked by me with the initials "De" and Exhibit 6 also was turned over to me and marked by me with the initials "De." They were subsequently wrapped

with all the clothing that was turned over to me by Mrs. Mayes and turned over to Agent Robert Neill of the FBI Laboratory.

Q When, were these items wrapped, sir?

A To be exact, I finished wrapping them at 2:10 p.m. on the 22nd.

Q Let me show you Government's Exhibit No. 4 that has been moved into evidence and ask you to identify this, sir?

A Government's Exhibit 4 was turned over to me at D.C. General by the victim, Mrs. Mayes, marked by me with the initials "De" and turned over to Agent Robert Neill with the other garments.

Q I have one further exhibit. I show you Government's Exhibit No. 2. Can you identify it, sir?

A Yes, sir.

Q Does it have your initials on it?

A Yes, sir, it's the blouse given to me by Mrs. Mayes and initialed by me and wrapped along with the other stuff and turned over to Agent Neill.

Q Was that wrapped at the same time the suit was wrapped?

A As I said before, I concluded marking and wrapping them exactly at 2:10 that day.

MR. NUNZIO: Your Honor, may this sweater be marked as Government's Exhibit No. 10 for identification?

THE DEPUTY CLERK: Government's Exhibit No. 10 marked for identification.

(Sweater was marked Government's Exhibit No. 10 for identification.)

BY MR. NUNZIO:

Q Listen to my question carefully, if you will, please.

I am showing you what is marked as Government's Exhibit No. 10. Would you identify it for us, please?

A (Perusing exhibit.)

Q Can you identify it, sir?

A (Perusing exhibit.)

Q Just take your time.

(Witness perusing exhibit.)

MR. IANNI: I will stipulate.

MR. NUNZIO: Will you so stipulate that is his sweater?

MR. IANNI: Let me ask him.

MR. NUNZIO: Check it out.

(Defense counsel confers privately with the defendant.)

MR. IANNI: Yes, I will stipulate.

MR. NUNZIO: Your Honor, the defense is willing to stipulate that this is the defendant's sweater.

Is that correct?

MR. IANNI: That is correct.

BY MR. NUNZIO:

Q Can you tell me, sir, if this sweater ever came to your possession on the 22nd of January, 1967?

A No, sir.

Q In whose possession, if anyone, did it come into, if you know?

A Detective Roy A. Perry.

Q To your knowledge, do you know when it came into his possession?

MR. IANNI: Objection.

MR. NUNZIO: If you were present.

THE COURT: Was he present? I don't know.

THE WITNESS: No, sir.

BY MR. NUNZIO:

Q Let me ask you this question, then: Were all of the exhibits that you have identified, the bra, and Mrs. Mayes' suit, were they completely wrapped that afternoon?

A Yes, sir. Like I stated, I completed marking and wrapping them at exactly 2:10 p.m. on the 22nd of January.

Q How were they wrapped?

A In brown wrapping paper on my desk in the office of the Sex Squad and tied with white twine.

Q To your knowledge, did that sweater ever come in contact with the packages that you had wrapped?

A No, sir, definitely not.

Q What I am referring to is the defendant's sweater.

A This sweater was wrapped by Detective Perry.

MR. IANNI: Objection, Your Honor.

BY MR. NUNZIO:

Q Were you present?

A Yes, sir.

Q When it was wrapped, sir?

MR. IANNI: Objection, Your Honor.

THE COURT: He was there to observe it. What is the objection?

MR. IANNI: I think he testified first that he was not there when this sweater came in.

MR. NUNZIO: Well, let me just rephrase the question, then, Your Honor.

BY MR. NUNZIO:

Q On the afternoon of January 22nd, 1967, sir, did you have occasion to see one Barrington Joseph Johnson?

A No, sir.

Q Whom, if anyone, if you know, had occasion to talk to Mr. Barrington Johnson that afternoon?

A Detective Perry.

MR. NUNZIO: Just one moment, Your Honor, if I may.

(Counsel conferred privately.)

MR. NUNZIO: May we approach the Bench, Your Honor?

THE COURT: Surely.

(AT THE BENCH:)

MR. NUNZIO: For simplicity's sake we could use these maps.

MR. IANNI: If he took this marking off "Route before attack."

THE COURT: Why do you need it?

MR. NUNZIO: I don't know what the defense is, that's why I am forced to present everything that I have. That is why I have had to go through all the evidence, because I don't know what the defense is. This is merely to show that two routes were taken. The Government could produce the individual who did it to show what the layout is as far as the grounds.

MR. IANNI: I have no objection.

MR. NUNZIO: Let me just reserve that.

THE COURT: I think you had better take the word "victim" out.

MR. IANNI: Yes, that is.

THE COURT: That is assuming a fact in issue.

MR. NUNZIO: I know. If we could just have these taken care of.

THE COURT: Don't we have a Xerox machine in the building to copy it and if you could blot those parts out.

MR. NUNZIO: It may be.

THE COURT: Just blot that much of it out and then Xerox it and you would have it, wouldn't you?

MR. NUNZIO: What if we got a black marker? I think it would discolor the whole thing.

THE COURT: All right. But this is prejudicial, "attack" and "victim".

MR. NUNZIO: We can take care of that during the recess, Your Honor.

THE COURT: Blot it out somehow. If you have no objection, he can use it. I don't think it is material to the case, but go ahead.

MR. NUNZIO: Thank you, Your Honor.

(IN OPEN COURT:)

BY MR. NUNZIO:

Q What if anything, sir, did you take over to Special Agent Neill of the FBI, other than the items you have identified here, of the plaintiff's clothing?

A All of the complainant's clothing, all of the suspect's clothing.

Q Now, you didn't physically see the suspect's clothing, did you?

A Yes, I did.

Q Where did you see them?

A At the Sex Squad Office at 3:00 p.m. on the 23rd of January when I reported to work.

Q Were you present when the suspect was there?

A No, sir.

Q Who had this clothing at that time?

A Detective Perry.

Q Who, if anyone, packaged the suspect's clothing at that time?

A Detective Perry in my presence.

Q It is your testimony that these were then packaged and taken to the FBI, is that correct?

A Yes, sir.

MR. NUNZIO: No further questions, Your Honor.

MR. IANNI: I have no questions of this witness, Your Honor.

THE COURT: Thank you, Detective.

(The witness left the stand.)

THE COURT: We will take a ten minute recess at this time.

(Whereupon at 2:50 p.m., a recess was taken.)

MR. NUNZIO: Detective Perry to the stand, Your Honor.

Whereupon,

ROY A. PERRY,

recalled as a witness on behalf of the Government, having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Detective Perry, may I remind you that you are still under oath.

A Yes, sir.

Q I am going to direct your attention, sir, to the afternoon of January 22nd, 1967. Did you have occasion to talk to anyone, sir, concerning the alleged sexual assault that had taken place on the morning of January 22nd?

A Yes, sir, I did.

Q To whom, if anyone, sir, did you talk to that afternoon?

A To the defendant.

Q You say "the defendant." Do you know him by name?

A Barrington Joseph Johnson.

Q Could you tell us where he is seated in the courtroom today?

A He is seated right over here at this table (indicating).

MR. NUNZIO: Your Honor, may the record show the witness has identified the defendant?

THE COURT: The record will so indicate.

BY MR. NUNZIO:

Q Where did you see the defendant, sir, and approximately what time was it that you saw him?

A At police headquarters, about 3:30 p.m.

Q Just answer the question yes or no: Did you talk to the defendant at that time?

A Yes, sir.

Q What, if anything, did you recover from the defendant at that time, sir?

A All the defendant's clothing that he was wearing at the time.

Q Could you enumerate some of the items that you took from him, sir?

A A multi-colored tan Angora sweater, brown corduroy pants, and a pair of underg shorts and a T-shirt.

Q I show you what has been marked as Government's Exhibit No. 10 for identification, sir. I ask you if you can identify this for us, sir?

A This is the sweater that I took from the defendant.

Q And that was at what time, sir?

A About 3:30 or 3:35.

Q What were Detective Sergeant DeMilt's working hours on the 22nd of January?

A 8:00 a.m. to 4:00 p.m.

Q At the time that these were recovered from the defendant, was Detective Sergeant DeMilt there, if you know?

A No, sir. He had taken overtime or compulsory time and had gone home at 2:00 o'clock.

MR. NUNZIO: Your Honor, may this ~~undergarment~~ be marked as Government's next exhibit for identification?

THE DEPUTY CLERK: Government's Exhibit No. 11 marked for identification.

(Men's shorts marked Government's Exhibit No. 11 for identification.)

BY MR. NUNZIO:

Q I show you, sir, what has been marked as Government's Exhibit No. 11 for identification. Can you identify this item for us, please?

A Yes, I can. These are the shorts I took from the defendant.

Q Did you take those the same time you took the sweater?

A Yes, sir.

MR. NUNZIO: May this pair of pants, Your Honor, be marked as the Government's Exhibit 12 for identification?

THE DEPUTY CLERK: Government's Exhibit No. 12 marked for identification.

(Brown corduroy pants marked Government's Exhibit No. 12 for identification.)

BY MR. NUNZIO:

Q I show you what has been marked as Government's Exhibit No. 12 for identification, sir. Identify those for us, if you will, please.

A These are the pants that I took from the defendant.

Q At the time that you took these items from the defendant, sir, to your knowledge, where were the complainant's clothes, Mrs. Mayes' clothes?

A I don't know exactly where they were. I think Sergeant DeMilt had them on his desk. He had wrapped them.

Q Were they wrapped in your presence?

A Yes, sir.

Q At the time that you recovered this sweater from the defendant and thereafter, to your knowledge, while it was in your presence, this sweater, was it ever intermingled with the complainant's clothes?

A No, sir.

Q What, if anything, sir, did you do with the defendant's pants, Exhibit No. 12 for identification, 11 for identification and 10 for identification?

A I wrapped this property and I took it to the FBI.

Q To whom, sir, if anyone, did you turn it over?

A Agent Bob Neill.

Q Did you have occasion to receive anything from Detective Cass on the afternoon of January the 22nd, 1967, sir?

A Yes, sir.

Q What if anything did you receive from him?

A A pair of white tan leather gloves and two keys.

Q After you had received these from Detective Cass, sir, what if anything did you do with them?

A I placed them in that brown envelope that you have in your hand there, and I kept possession of those in this folder which has been in my office in the file cabinet ever since I took them.

Q To whom, if anyone, sir, did you turn them over?

A The gloves?

Q Yes.

A Nobody.

Q Did you ever surrender them to anyone?

A No, sir.

Q Did you surrender them to me?

A Yes, I did.

Q When was that?

A Yesterday.

Q I show you what has been marked as Government's Exhibits 7 and 8 for identification. Would you identify those for us, please, sir?

A Yes, sir. These are the gloves and No. 8 are the keys that came from the car.

Q After this property had been turned over to the FBI, sir—Incidentally, what was turned over to Agent Neill of the FBI, sir?

A Do you want a complete rundown of all the clothing?

Q Yes, please.

A Can I look at my notes?

Q Yes, do.

A We submitted a letter to the FBI along with all of the property that I am going to read from this list. This is the property that was given to the FBI.

Combings from the pubic area of the victim; known combings from the head hairs of the victim; known pubic hairs

of the victim, a two-piece ladies' tan suit; white blouse; white panties; white slip; a panty girdle; white brassiere; a cardboard container containing paint scrapings from the rear of the victim's automobile.

Q Would you jump directly now, sir, to what if anything the defendant's items of clothing were taken to the FBI?

A The defendant's clothing was a sweater, a shirt, brown corduroy trousers, and his under shorts.

Q Did these items of clothing ever come back to your possession, that is, the complainant's clothing and the defendant's clothing?

A Yes, they did, sir.

Q When did they come back to your possession?

A March the 1st, 1967.

Q How did they come to your possession again, sir?

A I picked them up personally in company with Detective Sergeant DeMilt at FBI Headquarters and received them from Agent Robert E. Neill.

Q What, if anything, did you do with these items of clothing which were returned to you at this time, sir?

A Took them back to Police Headquarters and Detective Sergeant DeMilt sent them to the property clerk.

Q Are these items of clothing that you have examined today, namely, the sweater, the pants and the shorts, in substantially the same condition that they were in at the time they were taken by you from the defendant?

A Yes, sir.

Q Did you physically see the complainant's items of clothing at the time they were taken from her, sir?

A Yes, sir.

Q May I just present them to you, sir. That will be the brassiere, the blouse, the pants, the girdle and the suit.

Are these in substantially the same condition now, sir, as they were at the time they were turned in to the police property clerk?

A Yes, sir.

Q Did you have occasion to receive anything from Detective Cass, sir, on the morning of January the 22nd, 1967?

A Yes, sir. At the time he brought the complainant to the Sex Squad Office, he turned over to me a white envelope which had the name "Charles" written on it and a phone number.

Q Did you check that phone number, sir?

A Yes, I did.

Q What information did you come by as a result of checking the phone number?

A The phone number was checked by our chief operator through the telephone company and the listed phone was to a Dale Edward Anderson who lived at 4643 Livingston Road, Southeast.

Q Did you check as to what type of vehicle this individual had, sir?

A Yes, sir. It was a '61 Triumph.

Q Did you have occasion to see the gentleman who had that telephone number?

A Yes, sir. We responded that morning to Livingston Road, knocked on the door

Q Well, without going into anything else, was the complainant picked up?

A Yes.

Q Was any identification made at that time?

A No, sir.

Q What, if anything, did you do with that piece of paper, sir?

A I turned it over to our ID Bureau to be processed for latent prints.

Q Do you know what happened to that piece of paper, sir?

A No, sir.

MR. NUNZIO: The Court's indulgence, please.

(Short pause in proceedings.)

BY MR. NUNZIO:

Q At the time that these properties were turned over to the FBI, sir, was Detective Sergeant DeMilt with you at that time?

A Yes, he was.

Q At the time these properties were recovered from

the FBI, was Detective Sergeant DeMilt with you at that time, sir?

A Yes, he was.

Q And everything that you have testified to, sir, took place here in the District of Columbia?

A Yes, sir.

MR. NUNZIO: No further questions.

## CROSS EXAMINATION

BY MR. IANNI:

Q Detective Perry, you kept in your possession the keys and the gloves.

A Right, sir.

Q And the other items of clothing, you turned over, or by some means went to the FBI and then came back to you; is that correct?

A Right, sir.

Q Now, you got an examination of Mr. Johnson's automobile made.

A Yes, it was, sir.

Q And it is a fact, is it not, that you were unable to recover any fingerprints in Mr. Johnson's automobile?

A Yes, sir.

Q Now, did you also ask Mr. Johnson for his coat?

A I didn't, no.

Q Well, if you didn't ask for it, did there come a time that he gave you his keys for his vehicle to get his coat out of the trunk of his car?

A There was a tan coat recovered from the trunk of the vehicle.

Q Did you go and get that?

A I didn't recover that.

Q Do you know whether or not there were any battery cables in the trunk at the time that he was picked up?

A No, sir, I didn't search the trunk.

Q Is that vehicle still in the possession of the police?

A Yes, sir.

Q Where are these vehicles normally kept?

A They are sent to our impounding lot and the property clerk has possession of it. I think that is Blue Plains. I am not exactly sure where they send them.

(Counsel conferred privately with the defendant.)

BY MR. IANNI:

Q Did you also take from Mr. Johnson his driving permit?

A Yes, sir.

Q Do you still have that in your possession?

A Yes, I do.

(Counsel conferred privately with the defendant.)

MR. IANNI: I have nothing further of the witness, Your Honor.

REDIRECT EXAMINATION

BY MR. NUNZIO:

Q What address does the driver's permit indicate, sir?

A The permit shows 1614 T Street, Northwest.

Q When was the permit made out, sir, and when does it expire?

A The permit No. 2267719 expires on 7/24/67.

MR. NUNZIO: No further questions, Your Honor.

THE COURT: Thank you, Detective.

THE WITNESS: Thank you, sir.

(The witness left the stand.)

Whereupon,

ROBERT E. NEILL,

was called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Will you state your name, sir, and your occupation?

A My name is Robert E. Neill. My occupation is Special Agent, Federal Bureau of Investigation.

Q What is your specialization, sir, with the FBI?

A I am assigned to the staff of the FBI Laboratory in Washington. I specialize in the microscopic examination of hairs, fibers and textile materials.

MR. IANNI: Your Honor, I would stipulate that he is a qualified expert in the field of hairs and fibers.

THE COURT: Do you want to take the stipulation or do you want to put in his qualifications for the record?

MR. NUNZIO: I will accept the stipulation that he is an expert in the field of hairs and fibers, Your Honor.

THE COURT: Very well.

BY MR. NUNZIO:

Q Mr. Neill, did you have occasion to see Detective Perry and Detective Sergeant DeMilt in January of 1967, sir?

A Yes, sir; that is correct.

Q When specifically in January was it that you saw them?

A That would be on January 30th of 1967.

Q At that time, sir, what if anything was given to you by these officers?

A At that time, I was given a number of articles of clothing consisting of women's clothing, also a number of articles of men's clothing, also a number of samples of paint scrapings from an automobile and several hair samples.

Q I am going to show you what has been marked as Government's Exhibit No. 1 that has been moved into evidence. I ask you if you can identify that for us, sir?

Also Government's Exhibit 1-A that has been moved into evidence, and ask you if you can identify that for us, sir?

A Yes, sir. Both exhibits were received by me on January 30th, 1967.

Q I show you Government's Exhibit No. 2, sir, that has been admitted into evidence and ask you if you can identify that for us, please, sir?

A This is also among the articles that I received on that date.

Q I show you, sir, what has been marked as Govern-

ment's Exhibit 4 and has been moved into evidence and ask you if you can identify that?

A Yes, sir. I identify this as having been received on that date.

Q I show you also Government's Exhibit No. 10 for identification, sir, and ask you if you can identify that for us, please?

A This was also received by me on January 30th, 1967.

Q With respect to the exhibits before you at the present time, sir, that is a ladies' two-piece suit, Government's Exhibit 1 and 1-A; a ladies' blouse, Government's Exhibit What is the number on the blouse?

A No. 2.

Q And the brassiere that you have identified, sir, along with the sweater before you. What; if anything, sir, did you do with respect to these items before you?

A Well, first of all, it was determined that these items had been properly packaged and protected by the contributor, that is to say, the Metropolitan Police Department.

After making this determination, I later examined these articles for the presence of foreign textile fibers in order to ascertain whether or not any foreign textile fibers were on these garments which could be associated with respect to an interchange which may or may not have taken place.

Q At the time that you received the sweater, sir, before you, was this packaged separately from the other items before you, sir?

A Yes, sir, it was.

Q At any time prior to your testing or checking any of these items of clothing before you, sir, did that sweater come in contact with any of the lady's apparel presently before you?

A No, sir. The procedure we employ in making this type of an examination precludes any such possibility.

Q What tests were run, sir, with respect to all those items before you?

A Well, the way we handle the garments, we took them out of each package individually and suspended them from a rack over a table approximately the size of counsel table. A clean sheet of paper is placed on the table and the gar-

ment is carefully scraped with a spatula type of device. All loose debris consisting of hairs, fibers, soiled particles, paint chips, whatever it might be, is collected on this sheet of paper.

This debris is then placed in a suitable container, usually a cardboard pillbox, after which the contents of the pillbox is subjected to a high-powered microscopic examination.

After this examination takes place, certain of the contents—in this case fibers—were removed and placed on vast microscope slides for further microscopic examinations in order to determine whether the foreign fibers found on the garments were of significance with respect to a possible interchange.

Q With respect to the items before you, sir, specifically the sweater, will you tell us what results, if any, there were concerning an interchange of fibers between the lady's apparel and that sweater?

A I found no foreign textile fibers of apparent significance on the sweater. With respect to the lady's garments, there were numerous woolen fibers, four different colors. Specifically, these colors are yellow, a blueish green, a red and a gold, which were found on each of the three ladies' garments, which were the same color and exhibit the same microscopic characteristics as the fibers which compose of the sweater.

Based upon these findings, if I may proceed, one may conclude that these fibers either originated from this garment or from other source of woolen fibers which possess these same microscopic characteristics.

Q Specifically, you found fibers with the characteristics of the sweater on this ladies' brassiere, is that correct?

A That is correct.

Q On this ladies' blouse, is that correct?

A That is correct.

Q And, too, on this ladies' suit?

A That is correct.

Q To your knowledge, what if anything did you do with the items of clothing after you had completed your examination?

A Well, these items of clothing were eventually returned to Detective Perry of the Metropolitan Police Department, and that would have been on March the 1st of 1967.

Q With respect to any chemical analysis, sir, what if anything was done to the remaining sets of clothing that you have?

A I conducted no chemical analyses on the remaining clothing myself. However, on February 6th of 1961, I gave all articles of clothing to Special Agent Thomas Kelleher, who is also a member of the staff of the FBI Laboratory, for purposes of chemical analysis.

MR. NUNZIO: No further questions of this witness, Your Honor.

## CROSS EXAMINATION

BY MR. IANNI:

Q Mr. Neill, if I understand your testimony correctly, what you have just testified to is that you found what could possibly be interpreted on these three garments of the woman fibers of clothing that could have come from this sweater, is that correct?

A Essentially, that is correct.

Q Now, in addition to these three garments, you also examined other garments of the woman?

A That is correct.

Q You examined her slip, did you not?

A Yes, sir.

Q And on her slip, did you find any fibers that could have come from this sweater?

Q You examined her suit which included the coat and jacket; you examined her blouse; you examined her panties; you examined her slip; you examined her girdle and her brassiere.

You also examined, then, to see if there were any hairs on those items, is that correct?

A The hair examinations in this case were limited to an examination of these articles for the presence of pubic hairs. I was just going to say that these examinations were of no apparent significance to the prosecution of this case.

Q But you found no pubic hairs on these clothes?

A I will have to refer to my notes to answer your question. (Perusing notes.)

Yes, sir, I did find one dark brown pubic hair which possesses Negroid characteristics adhering to the brassiere. An examination of this hair disclosed that it possessed the same microscopic characteristics as those of the victim in this case.

Q So, therefore, all you are telling us is you found a hair in the brassiere that was the same as Mrs. Mayes' hair?

A Essentially, that is correct. Yes.

Q So you probably found Mrs. Mayes' hair on her brassiere?

A There is that probability; yes, sir.

Q But you found no hair on any of the other clothing?

A There were hairs found on the other garments, sir. I believe your question was as to pubic hairs.

Q That is correct. You found no pubic hairs?

A (Perusing notes.) I found no hairs that I could identify as being pubic hairs of the body, yes.

Q Now, you also examined Mr. Johnson's sweater, shirt, trousers and shorts, is that correct?

A Yes, sir.

Q And you found nothing in Mr. Johnson's clothing that would indicate that there were foreign fibers which were similar to Mrs. Mayes' clothing, isn't that correct?

A That is correct.

Q And you examined his clothing also for pubic hairs and you found no pubic hairs on his clothing.

A That is correct.

Q Now, you also had turned over to you combings from the pubic area of Mrs. Mayes, isn't that correct?

A Yes, sir, that is correct.

Q And the hair that you received on that was the hair which was similar to Mrs. Mayes' herself?

A That is correct.

Q And you also received combings of pubic hair of Mr. Johnson, isn't that correct?

A Yes, sir, that is correct.

Q And you found some pubic hair that was not his on his combings but were definitely not Mrs. Mayes', is that correct?

A Yes. The examination in this case disclosed that these hairs were microscopically dissimilar to the known pubic hairs from the complainant in this case.

Q Now, you also received in your possession whatever you get from the front seat of Mr. Johnson's automobile, isn't that correct? Q17, I believe it is.

A Yes, sir. This is described as the front seatcovers of the automobile.

Q All right. And in your examination of those, you did not find any evidence of any fibers that you could associate with Mrs. Mayes' clothing, is that correct?

A That is correct, sir.

Q And also in your examination of those, you found no evidence on those front seatcovers of any hairs, is that correct?

A I did find some hairs adhering to this exhibit. I found one black head hair which possessed Negroid characteristics. However, this hair did not match the complainant's hair with respect to microscopic characteristics. There were also fragments of black hairs which also possessed Negroid characteristics. These hairs were not suitable for further examination.

Q But you found no apparent significance in the hairs that you found?

A That is correct.

Q And then you also made an examination of the rear seat of the suspect's car and your examination proved the same as the front seat?

A There were no hairs found on the rear seat.

Q And you made an examination of his tan jacket, is that correct?

A Yes, sir, I did.

Q And you found none of the fibers that could be associated with Mrs. Mayes' clothing on his tan jacket?

A Well, the examination of the tan jacket, nothing

was found of apparent significance with respect to hairs or fibers.

MR. IANNI: I have nothing further of the witness, Your Honor.

MR. NUNZIO: Nothing further, Your Honor.

THE COURT: Thank you, Agent Neill.

(The witness left the stand.)

MR. NUNZIO: Call Mr. Kelleher to the stand.

Whereupon,

THOMAS F. KELLEHER, JR.,

was called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Would you state your name, sir, and your occupation?

A Thomas F. Kelleher, Jr. I am a Special Agent of the Federal Bureau of Investigation.

Q How long have you been employed with the FBI, sir?

A Approximately twelve years.

Q Do you have any specialized work that you do in the FBI, sir?

A Yes. I am assigned as a serologist in the laboratory of the Federal Bureau of Investigation, Washington, D.C.

Q What does a serologist do?

A We examine materials submitted to us by the various law enforcement agencies throughout the United States to determine if stains appearing thereon or if the materials themselves consist of blood, semen or other body fluids.

MR. IANNI: I will stipulate that he is qualified as an expert in this field, Your Honor.

THE COURT: Are you willing to take that stipulation?

Mr. NUNZIO: I will accept the stipulation that he is an expert in the field of serology, Your Honor.

BY MR. NUNZIO:

Q Mr. Kelleher, I am going to show you what has been marked as Government's Exhibit 11 for identification and Government's Exhibit No. 5 for identification. Have you ever seen these, sir, and if so, where have you seen them and when did you see them?

A (Perusing exhibits.) May I refer to my notes?

Q Yes, you may.

A Government's Exhibit No. 5 was received and examined by me in the FBI Laboratory in February of 1967. The examination conducted on these panties was made to determine if stains appearing in the crotch area of these panties, or for that matter, any stains appearing on these panties might be identified as semen, the male ejacula associated with sexual intercourse.

Q What, if anything, did you find, sir, after your examination?

A In two areas that were cut for testing that were marked 2-S and 3-S in the crotch area of these panties, semen containing spermatozoa, the male reproduction cell, were identified visually under the microscope with the aid of a chemical staining reagent.

Q Would you examine the other exhibit, sir. That is Exhibit No.

A This is Government's Exhibit 11.

Q Yes, sir.

A Government's Exhibit 11 was also examined by me in the FBI Laboratory in February of 1967 and attempts were made and examinations were made of cuttings from various areas of these under shorts. And in one area, marked 1-S, semen containing spermatozoa, the male reproductive cell which I referred to previously, which constitutes ejacula associated with sexual intercourse, was identified in this particular area.

There were other cuttings made and other stains appearing thereon but none of these other stains were identified as semen.

Q Mr. Kelleher, since you are an expert in the field of

serology, what effect, if any, sir, would water or soap and water have on a stain containing semen or spermatozoa?

A The effect, if a thorough washing was given, would be the carrying away of the stain. The stain is in some part soluble and is readily removed by a good washing. Perhaps just a douching with water would not be sufficient; it would have to be considerable washing.

MR. NUNZIO: Your Honor's indulgence, please.

(Short pause in proceedings.)

BY MR. NUNZIO:

Q After you had finished conducting these tests, sir, what if anything was done with these items?

A These items were returned by me to Special Agent Neill from whom I had received them and thereafter, he made disposition of these items.

MR. NUNZIO: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. IANNI:

Q Mr. Kelleher, did you make a written report of your findings?

A Yes, I did.

Q Do you have it in your possession now?

MR. NUNZIO: May we have the Court's indulgence, please?

(Counsel conferred privately.)

MR. NUNZIO: May we approach the Bench, Your Honor?

THE COURT: Surely.

(AT THE BENCH:)

MR. NUNZIO: Sergeant Perry has the sheet, if I can step outside, I can get it from Sergeant Perry in order to give it to counsel.

THE COURT: Do you want it?

MR. IANNI: Yes, I would like an opportunity to read it.

THE COURT: How much information is in it? How long would it take to read it?

MR. IANNI: I am sure my cross-examination—I would say let's finish with this witness. I won't be that long.

MR. NUNZIO: Let me see if the Sergeant is outside first.

THE COURT: I don't like to excuse the jury at this time of the day either, so let's do it as casually as we can.

(IN OPEN COURT:)

(Mr. Nunzio left the courtroom temporarily at 3:47 p.m.)

BY MR. IANNI:

Q Is this a copy of the report that you made to the Metropolitan Police Department? (Handing documents to the witness.)

A If I may make a clarification of our procedures, this report was actually dictated by Mr. Neill. He used an insert that I gave him concerning my results, so that in other words it is a combined report, if I am not mistaken. It is a final report that was made separate from another report that was issued. I think there were two reports in this case.

Q Well now, are you aware that this report states, "Specimens Q2, Q5, Q6, Q13 and Q17 were examined for semen and none was located."

A No, I was not aware of that, sir.

I can see where it could have happened though. If you look at my original notes and I made a correction in my notes where the same numbers of specimens were used. These are rough draft notes. There is a choice of wording here that is used when several cuttings are made. We can either state that semen was found in one location and not in others and in this way mention the same specimen twice as having found positive and negative results from the same semen.

Q But that report right there says there was nothing on Mr. Johnson's shorts, is that correct?

A No, sir, the report says—if you will look at the first sentence of the report, it identifies semen—

Q Well, it says both. It says some was on Mr. Johnson's shorts and in another place, it says there was nothing on them.

A Yes, well, that is the wording of that report. Yes, sir. My testimony, I think, will clarify that.

Q Then, of course, all you are telling us here today is that you did find something that you can associate to a male, any male, on Mrs. Mayes' panties?

A The summation, as you put it, any male being a

person who is capable of having sexual intercourse or producing sperm.

Q Yes, sir. That could have been her husband or anybody?

MR. NUNZIO: Objection.

THE WITNESS: I don't know of her relation. Excuse me.

MR. IANNI: Well, it could have been any man, is that right?

MR. NUNZIO: Objection, Your Honor.

THE COURT: Well, I think the only qualification is a man capable of ejaculating sperm.

BY MR. IANNI:

Q Any man capable of producing a sperm.

A Yes, sir. I can make no further identification.

Q And what you testified to as to the shorts, that is also any man?

A Yes, sir. There is no positive identification of an individual's production of the sperm cell.

MR. IANNI: I have nothing further of the witness, Your Honor.

MR. NUNZIO: Nothing further, Your Honor.

THE COURT: Thank you, Mr. Kelleher.

(The witness left the stand.)

THE COURT: Gentlemen, could I ask you to approach the Bench a moment.

(AT THE BENCH:)

THE COURT: I have to take three or four sentences tomorrow morning. I am going to excuse the jury until 10:30.

You are not on motions tomorrow, are you?

MR. NUNZIO: No, Your Honor.

THE COURT: Are you about ready to close out?

MR. NUNZIO: I think that is my last witness. The only thing I have to do is move the exhibits into evidence, but I think that would conclude the testimony.

THE COURT: Yes.

Are you going to take a lot of time in the defense?

MR. IANNI: I think we will finish it tomorrow.

THE COURT: Will we go to the jury tomorrow?

MR. IANNI: Definitely. I hope to. It all depends upon

his cross-examination, of course.

MR. NUNZIO: Are you going to have the other witnesses here?

MR. IANNI: Their testimony won't take long.

THE COURT: Do you intend to put this boy on the stand?

MR. IANNI: Yes. If we get that far, yes.

MR. NUNZIO: What is the Court's position on Luck? He had pled guilty to assault, and he is charged with rape.

MR. IANNI: He pled guilty to simple assault.

THE COURT: According to this he pled guilty to intent to commit rape. I don't know you had better check this out.

MR. NUNZIO: Yes, Your Honor.

THE COURT: I don't think under Luck it ought to be used. It has nothing to do with credibility.

This is all I am basing it on. I think I will exclude it under Luck anyway.

MR. NUNZIO: I think that is what the Gordon case says anyway.

THE COURT: Does he have any other record we are concerned about?

MR. IANNI: That is all.

MR. NUNZIO: That is the extent of his record.

THE COURT: Very well.

(IN OPEN COURT:)

THE COURT: Ladies and gentlemen of the jury, I have other business at 10:00 o'clock tomorrow morning, so we will reconvene at 10:30. If you could be here by 10:15 so you can be checked in at the usual place in the jury room just behind the courtroom, it would be appreciated.

Do not talk about the case to anyone and do not let anyone talk to you about it tonight.

Good night.

(Whereupon, the trial in the above-entitled matter was recessed at 3:55 p.m. until 10:30 a.m. on Friday, January 19, 1968.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 335 67

UNITED STATES OF AMERICA

*v.*

BARRINGTON JOSEPH JOHNSON,

*Defendant*

Washington, D.C.,

Friday, January 19, 1968.

The above-entitled matter came on for further trial before the HONORABLE HOWARD F. CORCORAN, United States District Judge, and a jury at 10:40 a.m.

APPEARANCES:

On behalf of the Government:
NICHOLAS NUNZIO, Esq.
Assistant United States Attorney

On behalf of the Defendant:
SAMUEL F. IANNI, Esq.

PROCEEDINGS

(The following proceedings were had out of the presence of the jury:)

THE COURT: Mr. Ianni and Mr. Nunzio, would you come to the Bench, please?

(AT THE BENCH:)

THE COURT: One of the jurors—I don't know his name yet—but one of the jurors asked if he could see me and ask a couple of questions. I said I wouldn't see him without counsel present. I would suggest that we retire to my chambers since we don't know what he might blurt out before the defendant.

I suggest that we retire to my chambers and let him

come in and see what he is thinking about.

MR. NUNZIO: If it has to do with the case, the case is not completed.

THE COURT: I don't know what it has to do with. Let's see what it is about.

MR. NUNZIO: If it has to do with the case, I think we should discuss it before we answer him.

MR. IANNI: Let's just find out what his question is, I agree.

THE COURT: All right. Let's go into chambers.

(Whereupon, at 10:42 a.m., the following proceedings ensued in chambers in the presence of the Court, counsel and Juror Phillip Joram:)

THE COURT: Mr. Joram, I didn't want to talk to you without counsel being present since I never take ex parte conferences.

What was it you wanted to see me about?

Juror Joram: Well, I would like to apologize. I didn't know I was going to cause so much trouble.

THE COURT: That is all right.

Juror Joram: What I wanted to know is, as a juror, is it permissible for us to take notes or myself to take brief notes on some points of the testimony that I have doubts about or that I am curious about, or that I would like to consider?

THE COURT: Let me put it this way: There is no prohibition against it, but in my Court, I do not permit it.

My feeling is that nine out of ten people could take notes but can't listen at the same time and they have only some record that is being made as against another juror's. Then when the jury gets into the jury room to deliberate and they get in a dispute about what was said, one juror says, I can't remember that but look, this is what I wrote down.

So, I don't permit it. I want you to listen to the evidence and use your best recollection. I don't believe anybody can take notes and listen at the same time.

Juror Joram: How about after the case is over and I am home?

THE COURT: You mean after the verdict?

Juror Joram: After the case is over for the day, can I

write down thoughts that I have in mind that just didn't ring well?

THE COURT: I would suggest you don't do it; at least don't bring those notes into the jury room. If you have a bundle of notes and the next juror doesn't, that may sway him even though his recollection differs.

Do you gentlemen agree?

MR. NUNZIO: Yes, Your Honor.

MR. IANNI: Yes, Your Honor.

Juror Joram: The only other question I have is some expert testimony was given yesterday and, having a background in some of the medical sciences, there are some things I had doubt about. I was wondering if it was permissible to not consult with anyone but reviewing some technical publications relative to this thing that I have available?

THE COURT: No.

Juror Joram: No. All right.

THE COURT: You are going to base your verdict from what you hear from that witness stand. Don't go back to technical journals and start checking it out and that sort of thing. It is the testimony that you heard from the stand upon which you will base your verdict. We can't erase your knowledge but don't go out and check it by reference to scientific works and that sort of thing.

Juror Joram: I would like, if I may, say these questions are not partial to the Government or partial to the defense; they are just things I am concerned about. I want to make the best possible decision on my knowledge.

THE COURT: You are permitted to bring your knowledge to the jury room. That is what the jury is for. But, you limit your consideration upon things you heard from the witness stand and what knowledge you have right now. Don't go out and start to add to the case in an independent way.

Juror Joram: In other words, make my judgment on just what I heard from the witness stand and what I already know?

THE COURT: Yes.

Agreed, gentlemen?

MR. NUNZIO: Yes, Your Honor.

MR. IANNI: Yes, Your Honor.

THE COURT: Very well.

(Whereupon, at 10:47 a.m., the conference in chambers was concluded.)

(Whereupon, at 10:48 a.m., the jury returned to the courtroom and the following proceedings ensued:)

THE COURT: Good morning, ladies and gentlemen.

. . . Good morning, Your Honor . . .

THE COURT: Mr. Nunzio, are you ready to proceed?

MR. NUNZIO: Yes, Your Honor.

The Government has no further witnesses to present to the Court.

At this time, if I may review the evidence that has been admitted and the evidence that the Government proposes to have admitted into evidence.

Exhibits 1, 1 A, 2, 3, 4, 5 and 6 have been moved into evidence.

THE COURT: They were previously admitted.

MR. NUNZIO: The Government at this time, Your Honor, would move into evidence the white gloves, Exhibit No. 7 for identification.

THE COURT: Any objection, Mr. Ianni?

MR. IANNI: No objection.

MR. NUNZIO: Exhibit No. 8 for identification, car keys.

THE COURT: Any objection to the keys?

MR. IANNI: No objection.

MR. NUNZIO: Exhibits 9 and 9-A, I understand, Your Honor, have been received in evidence although the slides have been returned to the hospital.

THE COURT: Well, just as an excess of precaution—

MR. NUNZIO: Then, I would move, Your Honor, the slides examined by Dr. Sophia Perry and testified to by her be moved into evidence.

THE COURT: They were deemed marked yesterday.

MR. IANNI: No objection.

MR. NUNZIO: Exhibit No. 10, brown and gold sweater; No. 11, men's shorts; and No. 12, pair of men's pants. At

this time the Government would move that they be admitted into evidence.

MR. IANNI: No objection, Your Honor.

THE COURT: They will all be admitted into evidence without objection.

(Government's Exhibits 7, 8, 9, 9-A, 10, 11 and 12 for identification were received into evidence.)

MR. NUNZIO: The Government would rest, Your Honor.

MR. IANNI: May we approach the Bench, Your Honor?

THE COURT: Yes, surely.

(AT THE BENCH:)

MR. IANNI: If Your Honor pleases, at this time the defendant would make a motion for a directed verdict on the grounds that the Government's case having failed to make out a prima facie case even in its most favorable light and, of course, Your Honor is familiar with the testimony.

I think the complainant's acts in consenting—she took off her own clothes. There is no evidence that he used any force whatsoever. And the Supreme Court has said in Mills v. United States that in the ordinary case where a woman is awake, of mature years and sound mind and not in fear, a failure to oppose the carnal act is consent and though she verbally objects, if she makes no outcry, no resistance, she, by her own conduct, consents and the act is not rape.

THE COURT: I think that is good law. I think there are circumstances here—

MR. IANNI: I might refer Your Honor to Whorton's on Criminal Law. They also state that even though she may have been in fear at one time—

THE COURT: If her fear was allayed—

MR. IANNI: That is right. And if she doesn't resist to the end, there is no rape.

THE COURT: I know a lot of cases on this point. I have been disturbed by this, too.

MR. NUNZIO: The Ewing case sets forth even in the red book of instructions which is more applicable, if I may review—In the Ewing case, the Court says acquiescence

or consent if induced by threats or force which places the complainant in fear of life.

The testimony in this case itself, I think, will show here before the rape she was in fear for her life. She testified she was in fear for her life during the sexual act. She was in fear for her life after the sexual act and while she was being returned to the hospital.

The testimony is he grabbed her around the neck. He had her by the arm. He said, "I won't hurt you if you don't scream." That is the force that led to a negative response.

Perhaps counsel is arguing she didn't resist as much as he would have liked. I think the evidence in the case pursuant to the Ewing case the Government has made a prima facie showing in its most favorable light; and I would suggest to the Court that defense counsel's motion must be denied.

We are arguing the point as to consent.

MR. IANNI: In the Ewing case, although the Court of Appeals didn't go into the facts, there was evidence that this guy broke down the locked door to get this girl and this girl was a virgin. That is not even close to this case.

MR. NUNZIO: A stranger pushes her into his car and takes her into an isolated area. I think the evidence in this case is stronger than you would find in the Ewing case.

MR. IANNI: Not one sign of resistance, either verbal or physical.

THE COURT: People can be in such a state of fear that resistance disappears. You can freeze. People freeze in certain situations.

I think there is enough to go to the jury. I wouldn't say it was the strongest case but there is enough to send the case to the jury and let them determine whether or not she was so frightened that she couldn't resist.

I will deny your motion and you have your exceptions.

MR. IANNI: Thank you, Your Honor.

(IN OPEN COURT:)

THE COURT: Are you going to make an opening statement, Mr. Ianni?

MR. IANNI: Yes, with the Court's permission.

## *OPENING STATEMENT ON BEHALF OF THE DEFENSE*

MR. IANNI: Ladies and gentlemen of the jury, I guess we may have reached what may be determined the half way point because up to this point, you have only heard what the Government has to say about this case and this may not be half way in time, but now you will hear what Mr. Johnson, the defendant, has to say about this case.

Now, ladies and gentlemen of the jury, the evidence will show that on January 21st that is, the night before this Mr. Johnson had been to a party over in Northeast and he had consumed quite a bit of liquor.

Now, the evidence will show that this is rather important because of what occurred later, that he left that party shortly before the time or he left where the party finally broke up as far as he was concerned shortly before the time he arrived at the gas station located on Nichols and Lebaux Streets. He needed gas and pulled in like any other customer would pull in.

While he was there he never got out of his car while he was there, he could see the attendant working on Mrs. Mayes' car, and he also heard the attendant come over to tell Mrs. Mayes that he could not start her car.

And the attendant asked him, the evidence will show, if he would push her because she only had a short distance to go; and he said he would.

The evidence will show that he did. This has never been questioned. He didn't get any gas; that he got behind Mrs. Mayes' car and he pushed her into her place at St. Elizabeths Hospital.

The evidence will show that after he got her where she wanted to go he still never got out of his car—that she came to his automobile on the passenger's side of his automobile and he rolled down the window; and the evidence will show that she asked him if he wouldn't come back that afternoon to try to help her start the car; and the evidence will show that he told her well why didn't she get a service station.

The evidence will show that she told him that this was a Sunday and that it was impossible to get somebody.

The evidence will show that she kept urging for him to come back and help her start her car.

The evidence will show that he finally told her he could probably get battery cables from the Henry Fuel Company where he worked part time and that he could come back and start her car.

The evidence will show that at that time, she tossed, threw him her keys.

The evidence will show that she was never in his car, only except to look in and reach through the open window of his car to give him her keys.

The evidence will show that he was concerned about this, so concerned that he gave her his name and his phone number not someone else's. The evidence will show it was his name and phone number. The evidence will show that he then went home. The evidence will show that he got home sometime between 6:45 and 7:00 o'clock in the morning.

The evidence will show that his wife was up and his children were up.

The evidence will show that he slept in the very clothes that he had on that morning until about 10:00 o'clock or so; and the evidence will show that then, he went and called down at the Henry Fuel Company to make sure they had battery cables. He was assured they had.

The evidence will show that he that Sunday went there and picked up the cables. In fact, after he picked up the cables, the evidence will show that sometime in the afternoon, he went back to St. Elizabeths to where the car was parked.

The evidence will show that when he got there, there was someone washing a car and that he went over and talked to that gentleman.

The evidence will show that while he was sitting in the car some time later, the police came up to him and asked him did he push that car, and he readily admitted, the evidence will show, that he had.

And then the evidence will show the police officers said that, Well, whoever pushed that car, the lady said raped her.

And the evidence will show that he at all times steadfastly denied that she was ever in his automobile; and I think the evidence will show that.

The evidence will also show, ladies and gentlemen of

the jury, that Mrs. Mayes when she first came to work, went in and she talked to her supervisor, Mrs. Fushee; and the evidence will show or at least, the evidence will show that Mrs. Fushee told me this, that when Mrs. Mayes first came in, she asked her for annual leave. That is the first thing she did. She asked her for annual leave.

The evidence will show that then, after some discussion and Mrs. Fushee seeing she looked a little upset, inquired why she wanted annual leave and then at that time, the evidence will show, that Mrs. Mayes told her what had happened.

From all the evidence which we present to you, there isn't any doubt in my mind that there won't be a reasonable doubt in your mind, and after this case is over, we are going to ask you for a finding of not guilty for no other reason than he is not guilty.

Thank you.

Eugene Kaiser.

Whereupon,

EUGENE KAISER,

was called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. IANNI:

Q Will you give us your name, please?

A Eugene Kaiser.

Q Where do you live?

A 604 Orleans Place, N. E.

THE COURT: How do you spell your last name?

THE WITNESS: K-a-i-s-e-r.

THE COURT: Speak slowly and into that microphone, and keep your voice up, please.

BY MR. IANNI:

Q Do you know Barrington Johnson?

A I do.

Q How long have you known him?

A About 18 years.

Q Calling your attention to last January 21st, almost

a year ago now, did you have occasion to be with him on that particular night?

A I was.

Q Where did you meet him?

A At my house.

Q About what time of the day or night did he come there?

A I imagine it was around 8:30 or something.

Q What was the occasion for him to come there?

A To mess around together, party together that night.

Q And, did you go to a party that night?

A We did.

Q Where did you go to a party?

A The 700block of Sixth Street, 6th and L.

Q How long did you stay at the party?

A We stayed there, I imagine, about four or five hours.

Q Now, did you have anything to drink at the party?

A We did.

Q Did Barrington Johnson have anything to drink?

A He did.

Q Do you know how much he had to drink?

A I can't tell you exactly how much, but it was a lot.

Q Did there come a time that you left the party?

A We left about quarter of six in the morning.

Q And where did you go then?

A He carried me home.

Q And after he left you home, he left you?

A Right.

MR. IANNI: I have nothing further of the witness, Your Honor.

## CROSS-EXAMINATION

BY MR. NUNZIO:

Q How old are you, Mr. Kaiser?

A Twenty-seven.

Q Were you born here in the District of Columbia?

A I wasn't.

Q Where were you born, sir?

A I was born in Monroe, North Carolina.

Q Monroe, North Carolina.

Now, when did you first meet this gentleman, Mr. Johnson?

A The specific date?

Q Well, what year? You said you knew him for 18 years.

A Well, I have been around on Orleans a good little while. I was living on L Street before then.

Q Did you go to school with him?

A Yes, sir, I did.

Q What school did you go to with him?

A We went to Langley together.

Q And what grade was this?

A He was in front of me.

Q What grade was he in front of you?

A One year.

Q What class, sixth grade, seventh grade?

A Seventh.

Q Are you a close friend of his?

A I am.

Q Have you been very close for the past 18 years?

A We have.

Q You used the term, he came over about 8:30 and you were messing around together. Does this say you were keeping each other's company?

A We were.

Q Is this a seldom thing or did you do this quite frequently, sir?

A Quite often.

Q In the past three years, let us say, did you meet him two or three times a week or more than that?

A More than that.

Q On these occasions, did you spend the whole night together?

A We generally do.

Q You go out drinking together?

A That's about it.

Q In other words, more than two or three times a week for the past three years, you and the defendant have gone out drinking; is that right?

A We have.

Q Now, since you have known the defendant so long, do you know the defendant to be married or not?

A I do.

Q To whom was he married in January of 1967?

A Veronica—In '67?

Q One year ago, whom was he married to?

A He was married to Veronica.

Q Veronica who?

A Johnson.

Q Veronica Johnson. This is just a year ago, now. I don't mean to confuse you.

A He was married to Veronica.

Q Is he still married to Veronica?

A No, he is not now.

Q Do you know when he was divorced?

A Third of January.

Q The third of January of what year, of this year?

A Yes, this year.

Q In other words, just two weeks ago, he was divorced from Veronica—What is her last name?

A Johnson.

Q Do you know her maiden name?

A No, I don't.

Q Were you at the wedding?

A I was.

Q But you don't recall her maiden name?

A I really don't.

Q Where was he living with Mrs. Veronica Johnson in January of 1967?

A He wasn't.

Q He was not living with her?

A No, he wasn't.

Q Do you know if the defendant has any children, sir?

A I do.

Q Are they by Mrs. Veronica Johnson?

A He has one.

Q He has one by Mrs. Veronica Johnson, is that what you are telling us?

A He do.

Q How old is that child, if you know?

A I really don't know.

Q You may have answered this, and I don't mean to be repetitious: Was he living with Mrs. Veronica Johnson on January 21st, 1967?

A He wasn't.

Q He was not?

A No.

Q To your knowledge, when did he break up with Veronica Johnson, sir?

A That's hard to answer, sir; I don't know.

Q Let me just ask you this, sir: Was it before this party or after this party of January 21st, 1967?

A It was before this party.

Q Do you know where Mrs. Veronica Johnson was living in January of 1967?

A As far as I know, she was supposed to have been living with her mother.

Q Do you know what address that was?

A T Street, the 1400 block.

Q The 1400 block of T Street?

A Pardon me, the 1600 block of T Street.

Q 1600 block of T?

A Yes.

Q Now, in January you say that they were separated and were not living together. Do you know where the defendant was living in January of 1967?

A I do.

Q Where was he living in January of 1967?

A Brandywine Street.

Q Where?

A Brandywine Street, Southeast.

Q And do you know with whom, if anyone, he was living at this time, sir?

A He was living with a girl.

Q What was her name?

A Well, I call her Blanche.

Q Would that be Blanche Tyndle?

A Yes.

Q How long had he been living with Blanche Tyndle, if you know?

A I really don't know, sir.

Q How long had he been living at this Brandywine Street address before January of 1967?

A Close to a year or better.

Q Close to a year?

A Or better.

Q Was he living with Miss Blanche Tyndle a year before January of 1967?

A He was.

Q Who else resided in the house where the defendant was living at that time?

A Who else was living with him?

Q Yes.

A His family.

Q What family is that, sir?

A The family he had by her, two kids.

Q Oh, he had two children by her, is that correct?

A Yes.

Q So we are not confused, he was living at this Brandywine Street address for almost a year before January 1967, is that correct?

A I believe so.

Q Had you visited him over there?

A I have.

Q In other words, you had occasion to be over there and visit with him at his Brandywine Street address?

A I have.

Q Now, where were you working, sir, in January of 1967?

A Fox & Kasmir.

Q What type of an organization is that?

A Appliances.

Q Appliances?

A TV appliances.

Q Do you repair, deliver or sell?

A No, I am a helper.

Q How long have you been working there, sir?

A Two years and a half.

Q Now, will you tell us, if you know, where Mr. Johnson was working in January of 1967?

A Corson & Gruman.

Q How do you spell that, if you know?

A I don't, sir.

Q All right. Would you just pronounce it again so I can get the pronunciation of it?

A Corson & Gruman.

Q What type of organization is that, sir?

A Construction.

Q Do you know how long he had been—strike that.

Let me ask ~~you this~~ question: What type of work, if you know, was the defendant doing with this construction company?

A No, I don't know.

Q Do you know how long the defendant had the job with this construction company?

A I can't be specific, but it had been a little while.

Q Now, you knew him to work for a fuel company though, Mr. Johnson?

A Yes.

Q That was back in 1966, though, wasn't it?

A Sixty-seven, too, part time.

Q Was he working part time?

A He was.

Q And how did you come by this information that he was working part time?

A He told me.

Q He told you?

A Yes.

Q So, other than he told you he was working part time for the fuel company, you have no independent knowledge that he was in fact working for this fuel company; is that correct?

A No.

Q Incidentally, do you know the name of the fuel company?

A Henry Fuel.

Q Henry Fuel Company?

A Right.

Q I am speaking now of January 1967. Do you know what the defendant's working hours were on this construction work?

A No, I don't know specifically what they are but he had to leave early in the morning.

Q Were these people constructing at St. Elizabeths Hospital, if you know?

A No, I don't.

Q This was Corson & something else construction, is that right?

A That's correct.

Q Now, how do you know it to be about 8:30 that the defendant came to your house on January 21st, 1967?

A I was looking at television.

Q Was this a planned party at this 6th and L Street address?

A Was it a planned party?

Q Planned party.

A I imagine so. I was invited and I invited him with me.

Q Who was giving the party at that address?

A A fellow named Fred.

Q Fred?

A Right.

Q Can you tell us some of the people who were at this party?

A It's quite a few of us was there. A lot of people I don't know was there.

Q Were men and women there?

A Surely.

Q Approximately how many men were there and approximately how many women were there?

A Well, that's hard to tell.

Q Well, just approximately.

A I couldn't give you no specific answer on that.

Q Well, were there more than five men?

A Surely.

Q More than five women?

A There were.

Q When he came over to your house, he came over alone; is that right?

A He did.

Q When you went out messing around more than two or three nights a week, did he come alone?

A He do.

Q Now, you got over to this party at 6th and L at about what time?

A We got there about 10:30, quarter to eleven.

Q Between 8:30 and 10:30, where were you, sir, if you can recall what you did?

A Well, we went to the liquor store.

Q You went to the liquor store?

A We did.

Q Did you buy anything?

A We did.

Q What did you buy, if you recall?

A Liquor.

Q How much liquor did you buy?

A A pint.

Q A pint?

A We did.

Q Who had the money for the pint?

A We both had the money.

Q We both kicked in to buy the pint, is that it?
A We did.
Q Incidentally, what did you buy?
A A pint of Old Taylor.
Q All right. Did you consume that liquor?
A Consume it?
Q Did you drink it?
A We did.
Q Where did you drink it?
A In my house.
Q Is that all the liquor you had at your house?
A No.
Q Did you have something else?
A We did.
Q What else did you have?
A More liquor.
Q Where did this come from?
A My uncle.
Q How much did you get from your uncle?
A We had a fifth.
Q You had a fifth?
A We did.
Q Did Mr. Johnson drink as much or less than you?
A About the same. It's hard to tell.
Q Was he high?
A He was.
Q How high was he? Was he staggering?
A When he left me?
Q I am talking about between 8:30 and 10:30.
A Oh, no, he wasn't staggering then.
Q He wasn't staggering then?
A No.
Q All right. Now, you had consumed a pint of liquor before you went to the party, right?
A Yeah, with help.
Q With him?
A With help.

Q With help.

A Truly.

Q Truly, with help. I appreciate that.

Now, you had help. Whose help did your have drinking this, sir?

A There was a fellow named Buck.

Q Did Buck go to the party too?

A He did.

Q Well, now, there was you, Fred at that party—

A Fred was there. Fred was giving the party.

Q That is right. And then there was certainly more than four or five men at the party, weren't there?

A There were.

Q How much did the defendant have to drink before he got to that party, if you know?

A No, I don't know.

Q Was he drinking with everybody else?

A In the party?

Q No, before you got to the party, at your house.

A Me and him, Buck, my uncle, and then come my brothers too. They had something to drink there too.

Q This was before you even went to the party?

A Before we went to the party.

Q All right. Were you feeling pretty high?

A Good.

Q What do you mean by "good"?

A Well, I wasn't what you would call high either.

Q Well, approximately, since you are familiar with the fifths and the pints, approximately how much had you drank before you went to the party at Fred's place?

MR. IANNI: If Your Honor please, I would like to have Mr. Nunzio have his liberal cross-examination, but I think he has gone beyond the scope of the direct.

MR. NUNZIO: Your Honor, this is most relevant. He testified the man was high when he left. I am attempting to find out approximately—

THE COURT: You indicated to the jury that the defendant was high. This man has indicated he was high. Let's

see how high he was. But let's not make a laughing matter out of this. This is a serious case.

Go ahead.

BY MR. NUNZIO:

Q Approximatelly how much had you had to drink before you got to the party?

A Well, I presume I drank better than a half a pint.

Q Better than a half a pint.

Did anyone else have a car when they came over to your place that evening?

A No.

Q So, the only car that was available was the one that Mr. Johnson drove over in?

A That is right.

Q Was that his car, or was that Miss Tyndle's?

A Miss Tyndle's.

Q Miss Tyndle's car.

Now, you said you arrived at the party at what time?

A About quarter to ten or later.

Q Do you know what time it was?

A I don't know the specific time.

Q In other words, you don't know what time it was. You were feeling high, is that correct?

MR. IANNI: Objection, Your Honor. He has gone beyond

MR. NUNZIO: Your Honor, he opened the door.

THE COURT: Go ahead. Objection overruled.

BY MR. NUNZIO:

Q So in other words, you don't know what time it was when you went to the party?

A I'd say it was about 10:30 to quarter of eleven.

Q So, it's not quarter to ten but 10:30 or quarter of eleven.

Do you know how long it took to drive from your place to the party?

A How long did it take?

Q To drive.

A Oh, it should take no more than ten minutes at the most.

Q Ten minutes.

A At the most.

Q How close is St. Elizabeths Hospital to where you live, sir?

A I really couldn't give you a definite answer on that, sir.

Q It is miles or blocks?

A Well, it's miles.

Q All right.

Who was all in the car when you went to the party?

A There was Buck, my Uncle J.B. — that was it.

Q And Mr. Johnson and yourself?

A Yes.

Q So the car was filled up?

A It wasn't quite filled.

Q Well, there were four of you in the Falcon, is that right?

A Surely.

Q Did you do any drinking when you went over to the party?

A We did.

Q What did you carry over?

A We didn't carry anything.

Q Were you drinking anything on the way over?

A No, we didn't drink.

Q All right, that is my question. There was no drinking in the car when you went over to the party and it took you about ten minutes to get there.

Now, approximately how much liquor was served at Fred's place?

A I couldn't give you the definite answer, only approximate.

Q Was it several fifths?

A It was quite a few.

Q Were you in Mr. Johnson's company during the

course of that evening? Was he near you or talking with you?

A Well, no more than the time he danced.

Q Was he dancing?

A Surely.

Q There was music?

A Surely.

Q Did Fred give many parties before January of 1967?

A He have.

Q Mixed company, is that right, boys and girls, dancing and drinking?

A True.

Q Did you go over there quite frequently with Mr. Johnson?

A This was the first time Mr. Johnson was ever there.

Q This was the first time Mr. Johnson was ever there. During the course of that evening, did you see Mr. Johnson drinking?

A I did.

Q You said you saw him drink a lot, is that correct?

A Drinking—I might as well say yes.

Q Did you see him take many drinks, several drinks, and in fact drink them?

A I have.

Q During the course of that evening, I am talking about.

A In the course of that evening at that party?

Q Yes, at that party.

A I did.

Q Were you intoxicated by 3:00 o'clock that morning?

A I wasn't intoxicated, no.

Q You were not intoxicated?

A No.

Q If you can, can you estimate approximately how much you had drunk at the time that you left that party?

A No.

Q What time did you leave the party?

A Oh, quarter of six or maybe later.

Q Could it have been after six?

A No, it wasn't after six.

Q How do you know it wasn't after 6:00 o'clock?

A At 6:00 o'clock, my grandmother usually be downstairs and she wasn't.

Q Was this your relative's house?

A No, it wasn't.

Q By the time you got home, you say?

A Truly.

Q So, it was not after 6:00 o'clock. Did you see your grandmother when you got home?

A I did.

Q Was it near 6:00 o'clock when she came down, if you know?

A She was already down at 6:00.

Q Oh, so it was after 6:00 then?

A It wasn't after 6:00.

Q Was it close to 6:00?

A About five of six, something like that.

Q This you are certain of?

A Positive.

Q You were not intoxicated?

A I wasn't.

Q Who drove you home?

A Mr. Johnson.

Q Mr. Johnson did?

A He did.

Q Did you talk to him when you got to the house?

A I did.

Q Did he get out of the car?

A He didn't.

Q How long would you say you were in the house before your grandmother came downstairs?

A I wasn't in the house when my grandmother came downstairs.

Q Where were you?

A She was already down there when I arrived at home.

Q It is your testimony your grandmother usually got up at 6:00 o'clock, is that right?

A That is right.

Q How long did you talk outside with Mr. Johnson before you went in?

A I imagine about five or ten minutes.

Q Was he intoxicated?

A He was feeling—I couldn't say intoxicated, no. Wait a minute. May I ask a question, Your Honor?

THE COURT: No, you just answer the questions.

BY MR. NUNZIO:

Q Was he weaving at the wheel when he drove?

A I wouldn't say he was weaving.

Q Was he sleepy at that time of the morning?

A I don't know if he was sleepy or not, but he was feeling bad, I know that.

Q How do you mean he was feeling bad?

A The way he talked.

Q How did he talk, with a slur, thick tongue?

A Slow. I asked him could he make it and he said he could.

Q You asked him could he drive you home?

A Could he drive hisself home.

Q How far away did he live from where you were living?

A Oh, about a mile.

Q Now, when he came over to the party, how was he dressed?

A He had on brown corduroys, brownish gold sweater and a shirt.

Q Now, you say you talked about five to ten minutes out in front of your house, is that right?

A We did.

Q What were you talking about at that time?

A I was asking him if he was straight enough to go home; if he wasn't, he could come in my house to sleep.

Q Why did you ask him if he was straight enough to go home?

A The way he was talking. He wasn't exactly what you call drunk but he was high, feeling good.

Q How far is it from where you were living to St. Elizabeths Hospital?

A I couldn't give you a specific answer on that.

Q You said Mr. Johnson was living on Brandywine Street at this time, is that right?

A He was.

Q Would he have to pass St. Elizabeths Hospital to get to his house?

A He can go past there.

Q Are there other routes?

A Yeah.

Q What would be the shortest route from your place to where he was living with Miss Blanche Tyndle on Brandywine?

A Eleventh Street would be the closest.

Q Straight down Eleventh Street to what street?

A All the way out.

Q All the way out Eleventh Street to Brandywine, right?

A That is the way I go. That's the only way I know.

Q From your place to 11th Street is how many blocks?

A Oh, four from my place to 11th Street.

Q In other words, from where you were living on Orleans Place to 11th Street is four blocks straight out 11th to Brandywine?

A It's more than four blocks to 11th Street. If you want to go all the way down to Brandywine, it is more.

Q No, I mean from where you were to 11th Street.

A From where I live to get to 11th Street?

Q Right.

A I imagine it's four.

Q Then you would go straight out 11th to Brandywine, right?

A To Atlantic.

Q Then after you got to Atlantic, what would you do?

A I would go up Atlantic.

Q And then what?

A Until I hit 6th and go down 6th to Brandywine.

MR. NUNZIO: Your indulgence, please, Your Honor, if I may.

(Short pause in proceedings.)

(Government counsel conferred privately with a witness.)

MR. NUNZIO: Thank you, Your Honor.

Your Honor, may we approach the Bench?

THE COURT: Surely.

(AT THE BENCH:)

MR. NUNZIO: I had my secretary call Mrs. Fushee down. I want to advise the Court that the subpoena is honored but that I called her down to facilitate matters.

THE COURT: Very well.

(IN OPEN COURT:)

BY MR. NUNZIO:

Q Now, what else did you talk about outside your house, sir?

A That was all.

Q Did you drive the car at all that evening?

A I didn't.

Q Did the car need gas?

A It didn't.

Q It didn't need gas?

A Didn't.

Q I say, did the car need gas?

A As far as I know, it didn't. I don't know for sure, now.

Q Who drove in the front seat of this car going to the party?

A Who drove? Mr. Johnson.

Q Who rode?

A I did.

Q Coming back, who else was in the car?

A Him, Mr. Johnson, my uncle and myself.

Q Were the other people in the car intoxicated?

A My uncle was.

Q And he lived at the same place you did?

A He lives at the same place.

Q Did anybody help him in the house?

A I helped him in.

Q Did Mr. Johnson help?

A No, he didn't.

Q What is your uncle's name?

A James Kelley.

Q Now, if you know, how far is it from your place to St. Elizabeths Hospital?

A I don't know, sir.

MR. IANNI: Objection, Your Honor.

THE COURT: This is repetitious, Mr. Nunzio. You have been over this about three times.

MR. NUNZIO: I understand. I am sorry.

BY MR. NUNZIO:

Q Now, you testified—the question possibly is repetitious but I want to understand you, sir. You talked to Mr. Johnson for five or ten minutes out in front of the house and you helped your uncle into the house; is that correct?

A I did.

Q Did Mr. Johnson leave before you had taken your uncle into the house?

A He did.

Q Where was your grandmother when you first saw her inside the house?

A In the kitchen.

Q Now, you have seen the defendant since January the 22nd, 1967; is that correct?

A I have seen him since then?

Q Yes.

A I have.

Q Have you seen him as recently as last week, socially, that is?

A Last week?

Q Yes.

A I haven't.

Q Have you seen him socially at all since January the 22nd, 1967?

A Occasionally I stopped by and talked to him.

Q At his house?

A No. I met him on the street.

Q As I understand your testimony, you have not socialized with him since January the 22nd, 1967?

A Not actually partying.

Q Not actually partying?

A No.

MR. NUNZIO: I have no further questions, Your Honor.

REDIRECT EXAMINATION

BY MR. IANNI:

Q Mr. Kaiser, how can you be certain of what you just testified to occurred on January the 21st and 22nd, 1967?

A I received a phone call that evening.

Q What was the phone call about?

A Told me Mr. Johnson was locked up.

MR. IANNI: I have nothing further of the witness, Your Honor.

RECROSS-EXAMINATION

BY MR. NUNZIO:

Q Who phoned you, sir?

A My brother.

Q What is your brother's name?

A Willy Kaiser.

Q Do you know where he was calling you from?

A Home.

Q What is his home?

A 2800 Shipley Terrace.

Q To your knowledge, did your brother know the defendant Mr. Johnson?

A He do.

MR. NUNZIO: No further questions, Your Honor.

MR. IANNI: Nothing further, Your Honor.

THE COURT: You may step down. Thank you.

(The witness left the stand.)

Whereupon,

ELIZABETH L. FUSHEE,

was called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TANNI:

Q Ma'am, will you give us your name, please?

A Elizabeth L. Fushee, R.N.

Q Where do you live?

A 3011 Nash Place, Southeast.

Q What is your occupation?

A Registered nurse.

Q In the course of your occupation, do you work one place more than another?

A Usually, I work on the wards with patients but sometimes, I relieve in the supervisor's office.

Q Where is that?

A St. Elizabeths Hospital, Geriatrics Division.

Q Were you so assigned on January 22nd, 1967?

A Yes, I was.

Q And under your supervision on that particular day, were you to have a lady work under you by the name of Luella Mayes?

A Yes.

Q What hours was she working?

A Seven to three-thirty.

Q Now, did there come a time that Mrs. Mayes came to work that day?

A Yes.

Q Do you recall approximately what time she came in?

A Approximately 7:30, somewhere around there.

Q And what, if anything, did she tell you when she first came in?

A When she came in she seemed upset and she asked if she could talk with me and if she could have the day off because she didn't feel that she could perform her duties.

I took her into the inner office where I talked with her.

Q But she did ask you for the day off, is that correct?

A Yes.

MR. IANNI: Nothing further of the witness, Your Honor.

CROSS EXAMINATION

BY MR. NUNZIO:

Q You are a nurse, is that correct?

A Yes.

Q You have been dealing with patients at the hospital, is that correct?

A Yes.

Q Would you tell us her emotional composition at the time that she spoke to you?

A She seemed very upset and she seemed to be trying to control her emotions.

MR. IANNI: Objection, Your Honor.

THE COURT: What is the objection?

MR. IANNI: I called her as my witness. As I understand cross-examination, cross-examination is limited to the scope of the direct. If he wants to —

THE COURT: She volunteered to you that when she came in, she was upset and asked if she could have the day off. Let's get the rest of the story.

BY MR. NUNZIO:

Q Would you repeat the answer, ma'am, again as to her emotional composition at the time?

A She appeared very upset and when I saw that she was quite upset and by view of the fact that she reported on duty late and was asking for time off, because she didn't feel that she could perform her duties, I took her into the inner office where we could talk privately.

Q Were there people outside at the time that she was talking to you, Mrs. Fushee?

A Yes. There was a clerk and people were passing back and forth in the outer office.

Q What was her emotional composition just as soon as you took her back into that inner room?

A When I took her into the room, I asked her what had happened, why she was late and why she thought she needed the day off.

She proceeded to tell me that she had had trouble getting to work, someone had accosted her. And at this time, she shed a few tears and she seemed to still be trying to compose herself, not to become too upset but I could see that she was upset.

Q You say that she did in fact cry?

A Yes.

Q Was it her habit to come in late?

A No, it was not.

Q When she asked for the time off, can you tell us approximately how she asked for this time off?

MR. IANNI: Objection.

MR. NUNZIO: Well, emotionally.

THE COURT: I don't understand the question. Rephrase it.

MR. NUNZIO: Your Honor, I will speak so counsel can hear me. He doesn't have to shadow me.

THE COURT: That's all right. Let us not get into bickering. Go ahead with your examination.

BY MR. NUNZIO:

Q When she spoke and asked for the time off, did she come right out and say, "I would like to have the time off. I can't perform my duties," as I have said it to you?

A Not in that tone, no, or in those words exactly.

Q During the entire time that she was talking to you outside and inside the room, was she in a nervous condition?

A Yes.

Q In an upset condition?

A Yes.

MR. NUNZIO: No further questions.

## REDIRECT EXAMINATION

BY MR. IANNI:

Q Mrs. Fushee, you did see her immediately upon her coming into the building, is that correct?

A Yes, she came to the office.

Q Well, she wouldn't normally have asked someone to see you, is that correct?

A Asked someone to see me?

Q Yes.

A No, she would not.

MR. IANNI: I have nothing further of the witness, Your Honor.

THE COURT: Thank you, Mrs. Fushee.

(The witness left the stand.)

THE COURT: We will take a short recess at this time.

(Whereupon at 11:42 a.m., a recess was taken.)

MR. IANNI: Call Blanche Tyndle.

Whereupon,

BLANCHE TYNDLE,

was called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. IANNI:

Q Will you give us your name, please?

A Blanche Tyndle.

Q Where do you live?

A 748 Brandywine Street, S.E., apartment 101.

THE COURT: How do you spell your last name?

THE WITNESS: T-y-n-d-l-e.

BY MR. IANNI:

Q Do you ever go under any other name?

A No.

Q Well, with whom do you live?

A Barrington Johnson.

Q Do you have any children by him?

A I have three children by him.

Q Have you ever represented to anybody that you are Mrs. Johnson?

A No, no more than a few neighbors.

Q Now, how long have you lived on Brandywine Street?

A For three years.

Q And were you living there on January of last year?

A Yes, I was.

Q Was Barrington Johnson living there with you?

A Yes.

Q Who else was living there with you?

A My three children.

Q Now, what time did Barrington Johnson come home on January the 22nd?

A 7:00 o'clock.

Q How do you know he came home at that time?

A Because I was upstairs dressing my kids and we were looking out the window.

Q What, if anything, did you see on that particular day when you looked out the window?

A Well, I saw him getting out of the car and I saw that he was, you know, had been drinking a lot. He could barely make it into the house.

Q When he came into the house, what if anything did he do?

A Well, he just laid across the bed, just fell off across the bed.

Q Did he take his clothes off?

A No.

Q Did there come a time, then, that day that he got up?

A Yes, he got up because he had told me the night before that he had to go to work the next day.

Q And do you recall about when he got up?

A Well, it was about 10:00, I think it was.

Q Do you know where he went after he got up?

A No. He told me he was going to work. That's all I know.

MR. IANNI: I have nothing further of the witness, Your Honor.

MR. NUNZIO: May I have the Court's indulgence, please?

(Government counsel conferred with the witness Det. Perry privately.)

BY MR. NUNZIO:

Q How long was Mr. Johnson living with you, Miss Tyndle, before January 21st and 22nd of 1967?

A Well, it was two years, not quite two years.

Q Two years?

A Yes.

Q What type of work was the defendant doing at that time, January of 1967?

A Well, he was driving an oil truck. He was working two jobs and he was working for Corson & Gruman.

Q Do you know what the construction site was with respect to where he as working?

A Pardon?

Q Do you know where the construction site was at the time that your husband was working for Corson & Gruman?

A He was driving a dump truck.

Q I know. He was driving a dump truck of sand and gravel. Do you know what the construction site was, where he was working?

A No.

Q Did he ever tell you?

A I am not sure whether he did. He probably did.

Q Now, which job was he working Monday through Friday? How did his jobs break up? You say he was working two jobs.

A He drove an oil truck at night and he drove a dump truck in the daytime.

Q He drove the dump truck in the daytime and the oil truck at night?

A Yes.

Q Did he drive that oil truck every night through the week in January of 1967?

A No, not every night.

Q Can you tell us how many nights a week he would drive that vehicle?

A Well, most of it was on the week ends and sometimes, they would call him if they needed him.

Q Mostly on week ends he would drive the fuel truck?

A Yes, uh-huh.

Q What hours did he drive the fuel truck on the week ends?

A Well, he would go from there to his other job, maybe until about 10:00 or 11:00 o'clock.

Q In other words, he would drive the fuel truck up until 10:00 o'clock in the morning?

A No, at night.

Q At night.

A Yes.

Q What time would he get off the fuel truck driving job?

A Well, he would go from his regular job to the fuel truck until about 10:00 or 11:00 o'clock at night.

Q Do you know what time he usually started work on the construction dump truck work? This is in January.

A Well, he got off at 3:00 and he started at 7:00, I think.

Q At 7:00?

A Yes.

Q In other words, he would start the dump truck work early in the morning and get off about 3:00?

A Yes.

Q Did he work Sundays on the dump truck?

A No.

Q Now, you had a phone in January of 1967, didn't you?

A Yes.

Q What was your phone number?

A 561-6239.

Q 561- —

A 6239.

Q Do you still have the same phone number?

A Yes.

Q You had this number on January the 21st and 22nd of 1967?

A Yes.

Q How was your husband contacted by the fuel company to work in January of 1967 since this was part time?

A Well, he would get in touch with them. He would call them.

Q Would he call from the house?

A Well, sometimes yes and sometimes he would call from the other job.

Q Now, when did he tell you that he had to get up at 10:00 o'clock because he had to go to work that day after you saw him come home in that condition?

A Well, it was on a Sunday.

Q It was on a Sunday that what happened?

A That he came in from the party and he told me that he had to go to work, to wake him up about 10:00.

Q Did he tell you which job he had to go to?

A Well, I knew which job he was going to.

Q Which job was he going on?

A To drive the fuel truck.

Q To drive the fuel truck?

A Yes.

Q He came in about what time?

A He came in about 7:00 o'clock.

Q Now, you testified that he could barely make it into the house.

A Yes.

Q What do you mean by this, ma'am?

A Well, he was not steady.

Q Was he staggering?

A Yes.

Q Was he weaving any?

A Yes.

Q Was his tongue thick so that he could barely speak legibly?

A Well, not that thick.

Q This was your car he was driving, is that correct?

A Yes.

Q What time did he leave the house the night before, if you know?

A Well, he was gone when I got home from work.

Q What time did you get home from work?

A I got off work at 4:00 o'clock. I had to pick up my kids and bring them home, so I got home about 5:30.

Q You got to the Brandywine address at approximately 5:30?

A Yes.

Q You had not seen Mr. Johnson when you got home, is that correct?

A No.

Q When was the last time you had seen Mr. Johnson before you saw him on that Sunday morning about 7:00 o'clock?

A I saw him Friday morning.

Q Friday morning?

A Yes.

Q You saw Mr. Johnson on Friday morning for the last time before you saw him on Sunday morning, is that correct?

A No, I saw him on Saturday morning too.

Q Saturday morning?

A Yes.

Q Where did you see him Saturday morning?

A At home.

Q Before you went to work?

A Yes.

Q What time was it that you went to work on Saturday morning?

A Well, I leave home about 6:30.

Q And he was still in bed?

A No, he was dressing to go to work too.

Q In other words, the last time you saw him, then, was at 6:30 Saturday morning?

A Yes.

Q And he was dressing to go to work and you were leaving for work, right?

A Yes.

Q Had he spent Friday night until 6:30 Saturday morning at the Brandywine address?

A Yes.

Q How was he dressed to go to work, ma'am, that Saturday morning?

A Well, he had on navy blue pants and a light blue work shirt and a brown cap.

Q This was the clothing he wore to drive the dump truck, I take it; is that correct?

A Yes.

Q Do you know a Eugene Kaiser, ma'am?

A Yes.

Q Do you know him to be a close friend of Mr. Johnson's?

A Yes.

Q As a matter of fact, they are drinking buddies, isn't that correct?

A Yes.

Q Did you have any difficulty arousing Mr. Johnson at 10:00 o'clock that morning after he had just come in at 7:00 o'clock?

A Yes, I did.

Q Was he still intoxicated?

A Yes.

Q Where did he fall asleep, ma'am?

A Across the bed.

Q And how was he dressed?

A He had on brown corduroy pants, gold sweater and he had on biege—bone colored shoes, and he had on a brown cap.

Q Did you normally drive your care to work?

A

Q It was your car but he drove it most of the time?

A Yes. I didn't have a license.

Q You testified he had been living with you for approximately two years before January the 22nd, is that correct?

A Yes.

Q Did he tell you where he was going to work at 10:00 o'clock that morning?

A No, but I knew where he was going.

Q Did you have any conversation with him about his intoxicated condition?

A Well, I reminded him of it at the time when he was coming in.

Q You reminded him of it at the time he was coming in?

A Yes.

Q And you say this was at 7:00 o'clock?

A Yes.

Q Did you look at the clock at that time to determine the time?

A Yes.

Q You did look at the clock?

A Yes.

Q Did he say anything when he came in?

A Just "Wake me up at 10:00 o'clock."

Q Do you know whether he went to work that day or not, if you know?

A No, I don't.

Q The defendant is still living with you; is that correct?

A Yes.

Q Have you discussed the incidents of that night or that morning with him since he was arrested?

A Yes.

Q You have talked this over with him?

A Yes.

Q How often would you say you have talked over with him the incidents of that night?

A Well, I couldn't say how often, but it's been quite a few times that I have talked with him.

Q When he left the house, was it his usual practice to take your car to go to work?

A Yes.

Q Did you see him drive off that morning?

A Yes.

Q What time did you see him drive off that morning?

A Well, we left out about the same time.

Q You went to work that Sunday morning?

A Yes.

Q And you left about 10:00 o'clock too?

A No.

Q What time did you leave?

A About 9:30.

Q About 9:30.

A Yes.

Q Well, then, what time was it that you awoke him and reminded him about his job?

A It was about a quarter after nine.

Q In other words, he was asleep only approximately two hours and fifteen minutes when you awakened him and reminded him of his job?

A Yes.

Q Did you see him leave the house?

A Yes.

Q You saw him leave the house that morning?

A Yes.

Q You saw him drive off?

A Yes.

Q And you left at 9:30?

A Well, it had to be later than 9:30.

Q All right. Well, you just tell us approximately what time it was when you left the house.

A Well, I can't say exactly, but I did see him leave the house and drive off.

Q Where were you working that Sunday morning, ma'am?

A I was working at the Annapolis Hotel.

Q What time were you due at work?

A Well, I had to be there—on Sundays, we have to be there about 10:00 or 10:30, about 10:30.

Q And you took a bus?

A Yes.

Q You did not ask him to drive you to work?

A No, because he said he was already late. He had to be there at 10:30. He was already late.

Q You testified he was still intoxicated when he left the house and you saw him drive off?

A Yes.

Q Now, when he drove the fuel truck, that is before

January the 22nd, how was he normally dressed to go on the job to drive that fuel truck?

A Well, he was wearing his work clothes that he wore on his regular job.

Q In other words, normally he would wear the same clothes that he wore on the construction job that he wore on the fuel truck?

A Yes. But on Sundays when he would go to work, he would dress and wear coveralls over his clothes; but other days, he would wear the clothes that he normally worked in.

Q Is it your testimony that he did not change his clothes that morning before he went to work?

A No.

Q When was the next time when you saw Mr. Johnson, that is, after you saw him that morning?

A Sunday morning?

Q Yes.

A Well, I went to see him in jail.

Q Did you have three children in January of 1961?

A Yes.

Q During the course of that morning, that is, from 7:00 o'clock when you saw him come into the house and 9:15 when you called him to get up, did he at any time wake up during that period of time?

A No. The kids tried to wake him. He would move but he wouldn't say very much.

Q In other words, nobody disturbed him during that period of time?

A No.

Q He got dressed. Did he have any breakfast?

A No.

Q Coffee?

A No.

Q Which direction did he head when he got into the car as he drove off?

A What do you mean?

Q When he drove off that morning, which direction did he drive off?

A We lived on the corner of Brandywine and he was parked on the opposite side of the street, so he just drove right out.

Q Have you ever been over to Mr. Kaiser's house?

A Yes.

Q That is at 604 Orleans Place, Northeast.

A Northeast, yes.

Q Do you know a relative of Mr. Kaiser, that lives at 6th and L, a man by the name of Frederick or somebody?

A Frederick? I don't recall.

Q Let me ask you this. Strike that.

I don't believe I caught it, ma'am, and if I did, I apologize. When was it that Mr. Johnson told you to remind him about his job, that he had to be out at a certain time for that Sunday morning?

A Well, he said that before he laid down. When he walked in the house, he said, "Wake me up at 10:00 o'clock."

Q That was the first time you knew he had to be on the job, is that right?

A Well, he usually drives an oil truck on Sundays.

Q He usually did?

A Yes.

Q Did he empty his pockets in your presence before he went to bed?

A No.

Q Did he say anything about assisting someone with a push and volunteering to help anybody with a car that morning?

A No, but he had some keys in his hand.

Q How do you know?

A I saw them.

Q What keys did you see in his hand?

A Well, I knew they weren't the keys to my car.

Q How did you know they were not the keys to your car?

A Because mine have the tag number on them and those didn't have the number.

Q How were these keys, loose or on a chain?

A It was on a chain, I think it was.

Q When did you see these keys in Mr. Johnson's hand?

A When he was lying on the bed, he had them in his hand.

Q You saw him with these keys in his hand while he was lying on the bed?

A Yes.

Q The children were not playing on top of him while he was asleep?

A No.

Q Did you ask him about these keys when you called him to go to his job Sunday?

A No, I didn't say anything.

Q You didn't say anything.

What type of keys did you believe the keys to be when you observed them in his hand?

A Well, I just saw them in his hand. I don't have no idea what they belonged to.

Q Was he holding the keys tightly while he was sleeping?

A Yes.

Q And he maintained his grasp on them?

A He always sleeps with his hands closed tightly.

Q Oh, he always sleeps with his hands closed tightly.

A But I could see the keys.

Q What part of the keys did you see?

A I saw the end of them.

Q The end of them?

A Yes.

Q When you went to awaken him to go to work, I take it he still had the keys tightly in his hand?

A Well, no.

Q Well, had they fallen onto the bed or were they still in his hand?

A They were still in his hand.

Q Still in his hand. Had he moved in that two hours and fifteen minutes that he was on the bed?

MR. IANNI: Objection, Your Honor.

MR. NUNZIO: Your Honor, this is most relevant.

THE COURT: Would you come to the Bench, gentlemen.

(AT THE BENCH:)

MR. NUNZIO: She is an alibi witness, Your Honor

THE COURT: She is not an alibi witness.

MR. NUNZIO: The testimony that he got some keys, she fails to even bring these keys up at all.

THE COURT: Does it make any difference whether they are tight in his hand?

MR. NUNZIO: If he was intoxicated, he wouldn't have remembered the key's and I am

MR. IANNI: In my opening statement, if you heard it, I represented to the jury that he had the keys in his possession.

MR. NUNZIO: I just want to know the information.

THE COURT: Nobody had yet put this man away from the scene of the crime. There is no alibi established yet.

MR. NUNZIO: It just tends to corroborate the Government's case.

THE COURT: Well, don't beat a dead horse and ask whether he was holding them tightly or loose.

MR. NUNZIO: I found it to be relevant but if the Court so deems, I will move on.

THE COURT: Just keep it moving.

MR. NUNZIO: Yes, Your Honor.

(IN OPEN COURT:)

MR. NUNZIO: I have no further questions then, Your Honor, of this witness.

MR. IANNI: I would ask that this be marked as Defendant's Exhibit No. 1, please, for identification.

THE DEPUTY CLERK: Defendant's Exhibit No. 1 marked for identification.

(Document was marked Defendant's Exhibit No. 1 for identification.)

REDIRECT EAMINAXTION

BY MR. IANNI:

Q Ma'am, I show you what for identification purposes has been marked Defendant's Exhibit No. 1. Do you recognize this?

A Yes.

Q What is it?

A A telephone bill.

Q And for whose telephone is that?

A For Barrington Johnson.

(Exhibit was shown to opposing counsel.)

## RECROSS-EXAMINATION

BY MR. NUNZIO:

Q This is an October bill, ma'am, is that correct?

A Yes.

Q This phone is not in service at this time, is it?

A No.

Q Well, then, you don't have a phone at this time, do you?

A No.

Q You told us that you have the same phone number and you stated the number but you don't in fact have that phone now, do you?

A No, we don't have it any more.

Q Well, when did the phone leave the premises? When was it taken out?

A It hasn't been taken out; it's just cut off. It's been about a month or over—it's been longer than that really.

THE COURT: Keep your voice up, would you, please, so we can hear you.

MR. IANNI: How long?

THE WITNESS: I can't say definitely how long it's been. I would say about the 1st of—about the middle of November, I think it was.

BY MR. NUNZIO:

Q Had you had the phone up to that time?

A Yes.

Q When did you first get this telephone number assigned to you?

A When I first got the phone.

Q That was when?

A Let's see—it's been three years ago. It's three years, I think.

MR. IANNI: I offer it at this time, Your Honor.

THE COURT: Let me look at it. What is the relevancy?

(Document was handed to the Court.)

MR. IANNI: To corroborate the telephone number as she testified to it.

THE COURT: Would you come to the Bench again, gentlemen.

(AT THE BENCH:)

THE COURT: I may be dumb but I don't get the connection. Is this the number he wrote on the piece of paper?

MR. IANNI: That is what we contend, that is the phone number he gave.

THE COURT: It is not connected in any way. What is the relevancy?

MR. IANNI: To prove he had a telephone and to prove that is the number of the telephone he had at that time.

THE COURT: And to prove he gave the girl a slip with the telephone number on it?

MR. IANNI: That is right.

THE COURT: That puts him on the place.

MR. IANNI: That is right, he is at the place.

THE COURT: What is all this alibi testimony? First you put him at the place by admission, then you take him away by testimony.

MR. IANNI: I put him there to the extent that he pushed the woman. After he pushed her to St. Elizabeths, he left.

THE COURT: Then what has Miss Tyndle's testimony and that boy friend's testimony got to do with it?

MR. IANNI: Both of them verify he was highly intoxicated. This would indicate he had a strong odor of alcohol on his breath. Mrs. Mayes testified she saw nothing peculiar about this man and she also testified he was not intoxicated.

THE COURT: I don't understand it. First you put him at the scene of the crime, then you put on witnesses to say he was not there.

You try your own case. But tell me the relevancy of this exhibit.

MR. IANNI: He will testify that when this woman gave him the keys, he gave her his name and telephone number in case she wanted to get in touch with him before the time he was to come back and this proves, one, he had a telephone and, two, what the number was.

THE COURT: It doesn't prove it in January.

MR. IANNI: By her testimony, she says it is the same number that she had in January.

THE COURT: I will allow it. Go ahead.

(IN OPEN COURT:)

MR. IANNI: I understand, Your Honor, that it has been admitted in evidence?

THE COURT: It has been admitted in evidence.

(Defendant's Exhibit No. 1 for identification was received in evidence.)

MR. IANNI: May I show it to the jury?

(Exhibit was shown to the jury.)

FURTHER REDIRECT EXAMINATION

BY MR. IANNI:

Q Ma'am, I show you Government's Exhibit 12 for purposes of identification and what has been admitted in evidence. Do you recognize these?

A Yes.

Q Who do they belong to?

A Barrington.

Q Were these the trousers that he was wearing on January the 22nd, 1967?

A Yes.

MR. IANNI: I have nothing further of the witness, Your Honor.

THE COURT: I want counsel back to the Bench again, please.

(AT THE BENCH:)

THE COURT: I am still disturbed about the telephone bill. Who testified that this is the number he gave her?

MR. IANNI: No one has yet, Your Honor.

THE COURT: Well, then you haven't connected it.

MR. IANNI: I will bring that out when the defendant

takes the stand, Your Honor.

THE COURT: Then, I will admit it subject to connection.

MR. IANNI: Very well.

(IN OPEN COURT:)

THE COURT: Ladies and gentlemen of the jury, that telephone bill that you are examining right now has been received subject only to connection. I may strike it later. We will see how the testimony develops. I will give you an appropriate instruction at the end of the case.

Is there anything further of this witness?

MR. IANNI: I have nothing further, Your Honor.

MR. NUNZIO: Nothing further, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

THE COURT: We will recess at this time until 1:45. Do not talk about the case during the lunch hour.

(Whereupon, at 12:38 p.m. the trial in the above-entitled matter was recessed until 1:45 p.m. the same day.)

## AFTERNOON SESSION

2:04 p.m.

Whereupon,

## ARTHUR COX, JR.,

was called as a witness on behalf of the defense, having been first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. IANNI:

Q Will you give us your name, sir?

A My name is Arthur Cox, Jr.

Q Where do you live?

A I live at 2847 Gainesville, Southeast.

Q Where do you work?

A I work for Henry Fuel Company.

Q Are you working there today?

A I am.

Q Where is Mr. Henry?

A Mr. Henry is down on a service call.

Q Now, is that a big company or a small company?

A It's a big company.

Q Do you know Barrington Johnson?

A Yes, sir, I do.

Q How long have you known him?

A I knew him when he was a small kid around about 53.

Q And back in January of 1967, did he work at Henry Fuel Company?

A He did.

Q Did he work full time or part time?

A At that time he was working part time.

Q Was there ever a time before that that he worked full time?

A Yes, he did.

Q Now, do you recall in January of 1967 when he called on a Sunday and asked for battery cables?

MR. NUNZIO: Objection, Your Honor, counsel mustn't testify.

THE COURT: Don't lead your witness, Mr. Ianni.

MR. IANNI: All right, Your Honor.

BY MR. IANNI:

Q Do you recall sometime last year when you were working and you gave Mr. Johnson some battery cables?

THE COURT: You are still leading the witness, Mr. Ianni. Let's get the testimony from him.

BY MR. IANNI:

Q Do you ever recall that Mr. Johnson ever borrowed anything from the Henry Fuel Company?

A He did.

Q And what did he borrow?

A Some battery cables.

Q When did he borrow those battery cables?

A One Sunday morning. He was on duty that morning.

Q Now, have those battery cables been returned?

A Not yet.

Q Were you working that day?

A Yes, I were.

MR. IANNI: I have nothing further of the witness, Your Honor.

## CROSS-EXAMINATION

BY MR. NUNZIO:

Q Do you know what day it was, sir, he borrowed those cables?

A No, I can't recall. I know it was a Sunday morning.

Q Do you know when it was last year that he did this?

A I don't know enough about that, but I remember it was a Sunday morning.

Q Was it last year or was it the year before that?

A It was last year.

Q 1967?

A Sixty-seven.

Q Do you know what part of 1967 it was?

A No, I don't.

Q Do you know the month?

A No, I don't.

Q You said you were on duty. What time did you come on duty that day?

A I opened up in the morning.

Q What time?

A Around about 6:00 or 7:00 o'clock.

Q And where were you located at that time?

A I was in the office when he came in.

Q You were in the office?

A That is right.

Q Where was the office located, what street?

A 4640 Minnesota Avenue, Northeast.

Q 4640 Minnesota Avenue, Northeast?

A Right.

Q Now, what time was it that you saw Mr. Johnson?

A I would say around about 9:30 or 10:00 o'clock.

Q How do you know it to be about 9:30 or 10:00 o'clock?

A Because it was in the morning.

Q The morning could run from 6:00 o'clock in the morning to 12:00 noon, could it not?

A No, it was earlier than that.

Q It was earlier than 12:00 o'clock?

A Yes.

Q Was it earlier than 11:00 o'clock?

A I couldn't say.

Q In other words, you don't what time he was there, do you?

A I know it was in the morning.

MR. IANNI: Objection.

THE COURT: What is the objection?

MR. IANNI: Well, the man has placed the time. He has told Mr. Nunzio the time and then Mr. Nunzio tries to narrow it down. He narrows it down to about the time and then Mr. Nunzio says, "You don't know what time it was."

MR. NUNZIO: He answered he didn't know, Your Honor.

THE COURT: Go ahead. Objection overruled.

BY MR. NUNZIO:

Q Just tell us the circumstances under which he came in to borrow the cables, sir. Just how did this happen?

A He said he needed some cables.

Q Did he say anything else?

A No.

Q Now, you have known him for a long time, is that correct?

A That is correct.

Q You are more like a friend or father to him?

A I wouldn't say no father, but a friend.

Q When did he start working for the Henry Fuel Company, if you know?

A He had been there around about five years.

Q Was he working full time in 1965?

A In '65?

Q Yes.

A Yes.

Q Was he working full time in 1966?

A In '66—

Q Roughly a year ago from this past Christmas.

A No, he was part time.

Q All right. What were his part time hours when he started working part time?

A Well, when he first started part time, he was night man.

Q What were his hours as a night man?

A Six o'clock and he would get through at nine.

Q Was he working approximately one year ago, January of 1967?

A He has been working there for the past two years part time.

Q Was he working that Sunday?

A Yes, he was working that Sunday. He was on duty.

Q What were his duty hours on Sunday?

A Well, see, we always have a man standing by, like. Sundays everybody don't work. We have one man that comes in and takes over the run outs. We have automatics and he stands by for around about two or three hours.

Q On this date when Mr. Johnson came in, he said something about the battery cables. Is that all that was said?

A Well, see, I was loading my truck. I know he asked the boss for some battery cables and I went on out.

Q How do you know he asked the boss for battery cables?

A Because I was standing in the office.

Q So, in other words, you saw him?

A That is right.

Q About how long were you observing him at the time he asked the boss for the battery cables?

A Well, my truck holds eighteen hundred gallons of oil—

Q No. I said, how long were you observing Mr. Johnson?

A That morning?

Q That morning, yes.

A Oh, I was in his presence, I imagine about an hour.

Q Did he appear fine to you?

A Huh?

Q Did he appear okay to you?

A Yeah, he maybe had a little taste.

Q A little taste?

A Uh-huh.

Q Was he staggering or anything like that?

A No, he wasn't.

Q Was he very coherent?

A Yes.

Q Clear?

A That's right.

Q How was he dressed?

A He had on a pair of pants and a coat, to my mind—I don't know.

Q Did he hang around the fuel company then?

A I left them right there.

Q What time did you leave?

A Oh, I would say around about 11:00 o'clock.

Q And he was still there?

A He was still there when I left.

Q And you say Mr. Henry is still down there, is that correct?

A What?

Q Mr. Henry is still the owner of the organization?

A That is right.

Q And you are positive that this man was working part time in January of 1967?

A I know he was working; I am not positive.

Q And you would see him there on Sundays, is that correct?

A Sundays and every evening after he got off his other job.

MR. NUNZIO: Your Honor, may I have the court file for one moment?

(Court jacket was handed to Government counsel.)

BY MR. NUNZIO:

Q What is your full name, sir?

A Arthur Cox, Jr.

Q Arthur Cox, Jr.?

A That is right.

Q Were you born here in Washington, D.C.?

A No, I was not. I was born in Wilmington, North Carolina.

Q And it is your testimony that he was talking to Mr. Henry that morning?

A All of us—there was about three or four of us was in the office that morning, but he had to ask him for his cables because he was the owner of them.

MR. NUNZIO: Thank you, Your Honor.

(Court jacket was returned to the Court.)

MR. NUNZIO: No further questions.

MR. IANNI: I have no further questions, Your Honor.

THE COURT: Thank you, Mr. Cox. You may step down.

MR. IANNI: May the witness be excused, Your Honor?

THE COURT: Is there any reason to keep him?

MR. NUNZIO: No, Your Honor.

THE COURT: Mr. Cox is excused.

(The witness left the stand.)

MR. IANNI: Mr. Johnson, please.

THE COURT: Could I ask counsel to come to the Bench before this witness is sworn.

(AT THE BENCH:)

THE COURT: I just want the record to be clear that you have told this defendant the consequences of his taking the stand.

MR. IANNI: Yes, I have advised him fully.

THE COURT: He knows he does not have to take the stand in his own defense but if he does, he suffers all the consequences that may result from it; is that correct?

MR. IANNI: Yes, Your Honor.

THE COURT: That is all. I wanted to have the record clear.

MR. IANNI: Yes, Your Honor. May I just remind him once again before he does testify?

THE COURT: Yes, do.

(IN OPEN COURT:)

(Defense counsel conferred privately with the defendant.)

Whereupon,

BARRINGTON JOSEPH JOHNSON,

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. IANNI:

Q Will you give us your name, please?

A Barrington Joseph Johnson.

Q And where do you live?

A 748 Brandywine Street, Southeast, Apartment 101.

Q How long have you lived there?

A Since July 30th, 1966.

Q Does anyone else live there with you?

A Yes.

Q Who?

A Blanche Tyndle and three kids.

Q Whose children are they?

A Hers and mine.

Q Now, calling your attention to January 21st 1967, do you recall what day of the week that was?

A Saturday.

Q And in the afternoon, where if any place did you go?

A In the afternoon, after I got off from work, I went home.

Q About what time did you get home?

A I would say around about 4:00 or 4:30.

Q At that time, where did you work?

A Corson & Gruman.

Q What business is that company in?

A Paving contractors.

Q And what did you do for them?

A I was a truck driver.

Q Now, after you came from work and went home, where if any place did you go?

A I went to Eugene Kaiser's house.

Q And where does he live?

A 604 Orleans Place, Northeast.

Q Do you recall about what time it was when you got there?

A It was approximately between 8:00 and 9:00 o'clock.

Q What was your purpose in going there?

A Just to visit him.

Q Now, what if anything did you do there?

A Well, we drank. His relatives and some of my friends and his friends were there.

Q How long did you stay there?

A I would say maybe two and a half hours or three hours, maybe.

Q From there, where did you go?

A To a party.

Q Where was the party?

A At 6th and L Street, Northeast, the last house on the corner on the left side.

Q Now, did you do any drinking there?

A Yes, I did.

Q What time did you leave the party?

A I think I took Eugene home about quarter to six.

Q Was there anybody else with you at that time besides Eugene?

A His uncle.

Q After taking him home, where did you go?

A I proceeded to go home myself.

Q Did you go directly home?

A No, I didn't go directly home.

Q Where did you go to?

A I went to a gas station.

Q Where was that gas station?

A It is about one block and a half from Portland Street on Nichols Avenue, Southeast.

Q What kind of a gas station was it?

A It is a Scott and Sinclair station all combined.

Q Now, what was your purpose in going to the gas station?

A Because, one reason was I needed gas and another reason was the gas is two cents cheaper than the regular gas at other stations.

Q And did you pull in there and get gas?

A I did.

Q What, if anything, happened when you got there?

A Well, the attendant wasn't at the station; he was over across the street. I waited and he came over to my car and asked me what did I want. I told him I wanted some gas. He told me he didn't have any gas.

I asked him what was he doing in the street after he told me he didn't have any gas. He told me the lady in the phone booth, her car wouldn't start.

He asked me did I have anything to start it with. I told him no.

He asked me would I push her. I said if it was all right with her.

Then I asked him before he left my car how far did she have to be pushed. He went and asked her and he came back and told me she was going to St. Elizabeths, and the fence to St. Elizabeths was right beside where her car was sitting and I told the attendant that she could walk in there, and he told me undoubtedly she didn't want to leave the car.

Q Did you push her?

A Yes, I pushed her.

Q And about how far did you have to push her?

A From there to the gate was about a half a block.

Q Now, after you pushed her—To where in St. Elizabeths did you push her?

A On a parking lot. I don't know one building from another in there.

Q How did you know where to go?

A Well, I was pushing her and I went where she led me.

Q Now; did there come a time when you stopped?

A Yes.

Q What, if anything, did you do then?

A I stopped pushing and that was it.

Q Did there come a time when she came to your automobile?

A Yes, when I backed away from her car, she came to my automobile.

Q What side of your automobile did she come to?

A The right-hand side.

Q Were your windows up at this time?

A Yes, they were.

Q Why were they up?

A Well, it was breezy in the morning.

Q Now, what if anything did she do?

A She told me that she was going to leave her car there but she didn't know whether she could get it started that evening, and I told her she could probably call the gas station and, you know, they would come out and start it for her. And she said probably there wouldn't be any gas stations open. I told her that of all the gas stations in this neighborhood, one of them would be open.

Q Did she say anything else?

A Well, she asked me could I come back and start it, and I told her I didn't have anything to start it with and I had to work that day and I didn't know how long I would have to work.

Then she threw her car keys on my seat and asked me to come back and start it anyway, and I told her I didn't want her keys and I wasn't going to touch her car. And she just stood there and I don't know what all she said, then I said okay I would come back and start her car. I wanted to go home.

Q Did she tell you what time to come back?

A She said she got off around 3:00, I think.

Q Now, did you give her anything at that time?

A I think she took down my name and my phone number.

Q Did you give her your name and phone number?

A I gave it to her. I didn't write it though; I gave it to her.

Q Was she ever in your car?

A No.

Q What, if anything, did you do after that?

A I went home after that.

Q Do you know about what time you got home?

A Blanche told me it was 7:00 o'clock when I came in.

Q What, if anything, did you do when you got home?

A Dropped down on the bed.

Q Did you take your clothes off?

A No, sir.

Q Do you recall when you got up then?

A Around 10:00 o'clock or 10:15.

Q After you got up, what if anything did you do?

A I went to telephone and called Mr. Henry at Henry Fuel Company and asked him did he have anything for me, and he said not right then. Then he asked me was I coming in and I told him I was coming in right away and that I needed the battery cables because some lady wanted me to start her car.

Q Was that the normal procedure with you, that you checked in with Mr. Henry before going to work?

A Well, I was supposed to be there at 10:00 and by me being late, I didn't want him to think that I was not coming so I called, and sometimes he will tell you on Saturday night, you know, to call him if it's warm and maybe you don't have to come in and he will pay you anyway.

Q Did you then go to work?

A Yes, I went to work right away.

Q When you got to work, did you talk to anybody?

A I talked to a few of the fellows that were there.

Q Did you get the battery cables?

A Yes, I did.

Q What did you do with the battery cables?

A Put them in the trunk of my car.

Q Do you know where those battery cables are today?

A No, I don't but they should be in the trunk of my car.

If they got that coat out of there, the police got the cables too.

Q Well, who has the car?

A The last time I seen it, it was at No. 4 and I got a letter from the police department to come and get it and Detective Perry refused to give the car away.

Q Now, when did you leave work?

A You are talking about Sunday morning?

Q Yes, that Sunday.

A I left around 1:30, I would say.

Q And where did you go?

A To Orleans Place, Northeast.

Q And after there, where did you go?

A I went to St. Elizabeths.

Q What was your purpose in going there?

A I was going to give that lady her keys back.

Q Now, when you got to St. Elizabeths, where did you go?

A I parked on the same lot that her car was parked on. I parked in front of it, two cars over. The lots are like this (indicating)—I don't know if it's parallel or not. I parked two cars over in front and her car was on the side like that (indicating).

Q Was anybody there at that time in that general area?

A It was a man right next to me washing a car, and I talked to him. I was also sick at the same time and he took some water and threw it on my car where I had been sick.

Q How long were you there before the police came?

A I would say a half hour, but I had seen Officer Hoffman—I knew him from seeing him before—go by a couple of times.

Q Were you sitting or lying in the car?

A I was sitting on the passenger's side talking to the man that was washing the car.

Q Now, did there come a time that someone came up to you and identified himself as a police officer?

A Officer Wesley came up to me.

Q And what, if anything, did he say?

A He said he was a police officer.

Q What did he ask you?

A He asked me what was I doing there and at this time, I got out of the car and I told him I was there to help that lady start her car.

Q What, if anything, did he tell you?

A He said, "What lady?"

I said, "I don't know the lady." I said, "I know the car." And I showed him the car.

He said, "That car there?"

I said, "Yes."

And he told me that that lady said she was raped this morning. I said, "I don't know anything about that."

He said, "Well, the fellow who pushed her car is the fellow that she says raped her."

I said, "Well, I pushed her car once. I don't know anything about any other time."

He said, "Well, you wait here for a while."

I told him, "I'm not going anywhere, I've got her keys."

Q Now, did you tell Officer Wesley at that time whether or not she had been in your car?

A I told him that she had not been in my car, him and all the other officers.

Q Now, there came a time that they placed you under arrest, is that right?

A Yes. I thought I was under arrest from the time they talked to me. They never said, "You are under arrest." A wagon came up about, I'd say, an hour later and they just said to get in the wagon. The officers on the wagon, they searched me.

Q Now, where did they take you to?

A Well, they went to No. 11 and at that time, they were changing shifts and I stayed in the wagon and two more officers took me downtown later on.

Q Did you go in No. 11?

A No, I did not.

Q When they took you downtown, where did they take you to?

A To the Sex Squad.

Q When you got to the Sex Squad, did you see anything there that you recognized?

A Well, I-seen—No, I didn't see anything that I would recognize. I seen that lady's clothes in a bag on a desk, the same clothes they had in here the other day, yesterday or this morning. They were in a bag on a desk. I could see the brown clothes in a Safeway bag, any bag. It didn't have any name on the bag that they were just in a bag.

Q How were you dressed at that time?

A I had on those clothes that they have in that box there.

Q And do you know about what time of the day or night this was that you got to the Sex Squad?

A I would say it was between 4:30 and 5:00 in the evening.

MR. IANNI: I have nothing further of the witness, Your Honor.

(Short pause in proceedings.)

MR. IANNI: Let me just ask one further question, if I may, Your Honor.

BY MR. IANNI:

Q Did you ever have sexual relationship with Mrs. Mayes?

A No, sir, I did not.

Q Had you ever seen her before that day?

A No, sir.

Q Did you ever tell her or threaten her in any way?

A No, sir.

Q Was she ever in your car?

A No, sir, she was not.

MR. IANNI: I have nothing further of the witness, Your Honor.

## CROSS-EXAMINATION

BY MR. NUNZIO:

Q Now, Mr. Johnson, when you went into the police station, you say you saw a bag with a lady's clothes in it?

A I did not say lady's clothes, I said clothes similar to

those that are on that table there. They were brown. That is the only thing I could see is the brown in the bag.

Q In other words, you saw an open bag, that is what you are telling us?

A It was full to the top.

Q The bag was full to the top?

A That's correct.

Q And the bag was open?

A That is correct.

Q You heard the police officers testify that they had in fact bundled these things by the time you were there?

A That is right, I heard them—

Q But you are telling us now that you saw a bag with clothes similar to those sticking out?

A I did.

Q And it is only then that you surrendered your sweater, is that what you are saying?

A Only then what?

Q After the police had taken you downtown, then your clothes were taken from you, isn't that correct?

A Detective Perry took them.

Q When this lady threw the keys in your car, Mr. Johnson, just how did she throw them in there?

A She was leaning with her head half in the window and her arm was leaning like this (indicating) and she had her handbag, if I am not mistaken, and she just threw the keys in the car out of her pocketbook. She took them out of her pocketbook.

Q She just took the keys out and threw them on your seat?

A After I told her I wasn't coming back.

Q Were the keys loose?

A I don't know whether they were loose or not. I'm pretty sure they were. It was two separate keys, I'm pretty sure.

Q Did you pick them up right away?

A No, I didn't touch them.

Q Well, when did you touch those keys?

A When I got home.

Q After you got home?

A That's correct.

Q What did you do when you got home?

A I kept them in my hand and went in the house.

Q Yet you were drunk?

A I was not drunk, I had been drinking.

Q Oh, you were not drunk?

A No, I was feeling good.

Q But you didn't weave or fall?

A I might have staggered a little.

Q But your mind was clear, was it?

A I had sleep on my mind.

Q Was your mind clear? Do you remember everything at that time?

A I do.

Q Now, you tell us that she got out of her car after you had pushed her onto the grounds. You don't know where. Is that right?

A All I know it's on the parking lot. I don't know one building from the other. All I know it's on the parking lot. I could show you if you took me there.

Q You have been on the grounds before, haven't you?

A Sure.

Q Because at one time, you were working for Corson & Gruman and you used to dump on those grounds.

A That's correct.

Q So, therefore, you have been on the grounds before.

A That's correct.

Q As a matter of fact, you only lived several blocks away from the grounds, is that correct?

A That is correct.

Q So, you knew the grounds.

A No, I don't know the grounds.

Q Where did you go when you used to dump the material for Corson & Gruman?

A I dumped the material across from the Canteen.

Q How far in did you push her that morning?

A To the parking lot.

Q Is it one parking lot or several parking lots?

A The lot over — I can't tell you like that. I don't know.

Q How many lots, I ask, if you know?

A I don't know how many lots there are.

Q Is there more than one?

A Yes, there is.

Q Did you know this specific lot?

A No, I don't.

Q Well, how did you know the lot you were looking for when you went back that afternoon?

A Because I had pushed her car there that morning.

Q It was dark then, wasn't it?

A It was dusk, I guess. I don't know what you call it. It was getting light outside. It was not that dark.

Q Had you taken her license number down?

A No, I didn't take her license number down.

Q But you knew where you had pushed her, is that what you are saying?

A Yes.

Q Even though you didn't know one building from the other?

A I knew the building that I had pushed the car around.

Q What building did you push the car around?

A I don't know the name of the building.

Q Geriatrics?

A That's what you all say it is.

Q I'm asking you. Did you know it?

A No, I didn't.

Q You said you didn't know the name but you knew the building, is that correct?

A That is correct.

Q Had you gone to work for Corson & Gruman that Saturday, the 21st of January 1967?

A On that Saturday, I'm not sure whether I worked for Corson & Gruman or Henry Fuel that Saturday, because

every Saturday Corson & Gruman don't work. I'm not sure but I think I did.

Q Did you work the week before January the 22nd at Corson & Gruman?

A The week before?

Q Yes.

MR. IANNI: Objection. I don't see where that has any relevancy.

THE COURT: Well, he is testing credibility.

MR. NUNZIO: Thank you, Your Honor.

THE WITNESS: The week before?

BY MR. NUNZIO:

Q Yes.

A No, I don't think so.

Q As a matter of fact, you hadn't worked for Corson & Gruman since that January 7th, 1967 until March the 18th, 1967, isn't that correct?

MR. IANNI: Objection, Your Honor. Now, that is a time after this and Mr. Nunzio knows where he was during that period of time.

MR. NUNZIO: All right. Let me amend my question then, Your Honor.

BY MR. NUNZIO:

Q Isn't it a fact that you hadn't worked for Corson & Gruman from January the 7th, 1967 up until the time that you were arrested?

A I was laid off two weeks. I was called back.

Q In other words, then you weren't working from January the 7th on to January the 22nd?

A They called me the Monday after the 22nd.

Q You were in jail at this time, is that correct?

A That is right. They called me then. You can verify that at the office.

Q I see.

Well, now, you don't recall whether you went to work on that Saturday afternoon or not, do you?

A Saturday afternoon?

Q January the 21st, 1967.

A I told you I worked during the day and I worked for Henry during the day. I had gotten off.

Q Did you in fact work that afternoon?

A I worked up until 3:30 or 4:00 o'clock that day and then I went home.

Q Now, when did you put the clothes on, the clothes that you were wearing at the time you were arrested?

A That Saturday evening after I got home.

Q Were the children there at the time you got home?

A No, they were not.

Q And you left I take it before the children came home, is that correct?

A That is correct. I went to pick them up and they had gone to go home.

Q Now, what time did you leave — Is it 728 Brandywine?

A 748.

Q 748 Brandywine, what time did you leave to go over to see Eugene Kaiser?

A I would say around — somewhere between 5:15 and 5:30.

Q And you got over there at that time?

A I got over to his house about — around between 8:00 and 9:00, I think.

Q You had Miss Tyndle's car, is that correct?

A That is right.

Q And where did you go, if any place, between that time?

A I was probably at the pool room.

Q Were you drinking at that time?

A No, sir.

Q So, you had nothing to drink up until the time that you got to Mr. Kaiser's place?

A I had one drink at home.

Q One drink at home.

A That is right.

Q Now, once again, where was this party located? You have described the building and everything else.

A 6th and L, Northeast.

Q Where was Mr. Kaiser living at this time?

A At 604 Orleans Place.

Q Northeast?

A That is correct.

Q You heard him testify that it took five or ten minutes to drive from his place to where the party was?

A I did.

Q You didn't drive. It's only a block and a half away, isn't that correct?

A I did drive and parked on L Street.

Q So, you drove a block and a half?

A I did.

Q It didn't take five or ten minutes, then, did it?

A You can't park anywhere near those places.

Q Where did you park when you went over to see Mr. Kaiser?

A I parked across the alley.

Q What alley?

A The alley between his house and the rest of the houses.

Q Where is the alley located?

A Between 6th and 7th on Orleans. You go straight up and then there's an alley going in the back.

Q Is the alley close to where the party was?

A Oh, no, this was on Orleans Place; the party was on L Street, 6th and L. The party was actually on 6th Street.

Q How far away was the place where the party took place?

A Three-quarters of a block.

Q Three-quarters of a block?

A That is correct.

Q And it's your testimony that you took the car, Mr. Kaiser, his uncle and someone else and you drove three-quarters of a block?

A That is correct. We drove further than three-quarters of a block to park.

Q And how far did you have to walk back to the place where the party was taking place?

A I would say a half a block.

Q A half a block?

A That's correct.

Q You were parked three quarters of a block away from where the party was?

A That is right.

Q And you drove the car to a point where you were a half a block away?

A That is right.

Q How long were you driving around then?

A Oh, I'd say three or four minutes driving to where I parked. Then I had to get to the party from there.

Q You drove five minutes to park a half a block

A I said three or four; I didn't say five minutes

Q Three or four minutes.

A That's correct.

Q You had been drinking, is that correct?

A That is correct.

Q How do you know it to be three or four minutes?

A I know the neighborhood, sir.

MR. IANNI: Objection. Counsel is arguing with the witness.

MR. NUNZIO: I'm not arguing.

MR. IANNI: And another thing, Judge, he won't allow the witness to answer the question before he asks another one.

THE COURT: He is allowed quite a bit of latitude on cross-examination. But give him a chance to finish his answers anyway.

MR. NUNZIO: Certainly, Your Honor. I apologize to the Court and the ladies and gentlemen of the jury.

THE COURT: It is very difficult to make a record with everyone talking at once.

MR. NUNZIO: Yes, Your Honor.

BY MR. NUNZIO:

Q How much did you have to drink when you went over to Mr. Kaiser's place, Mr. Johnson?

A I couldn't tell you exactly how much.

Q Approximately how much?

A I didn't measure and I couldn't tell you how much but I had quite a few drinks at his place.

Q Quite a few?

A Yes, I did.

Q Were you feeling high when you left there?

A No, I wasn't feeling high.

Q You weren't feeling high?

A No, sir. I was still moving around at his house.

Q What do you mean "moving around"? Were you standing, is that what you are saying?

A No. We were talking, and, you know, physically moving and looking at television.

Q You were constantly drinking, though, along with your conversation?

A I didn't say constantly. I said I had quite a few drinks. A drink can consist of anything. To me—

Q Well, what were you drinking?

A I didn't have a flask like that (indicating) full.

Q What were you drinking?

A We were drinking bourbon there.

Q On the rocks, mixed, or otherwise?

A Well, you usually drink coke with it, or at least I do.

Q Well, now, just how were you drinking it, with coke?

A Yes, I was.

Q Did you have anything else beside bourbon and coke?

A That's all I had there.

Q You went out and got some whiskey while you were there, is that right?

A That is correct.

Q How did you go, by automobile?

A Yes.

Q Well, then, your car wasn't parked where you had originally parked it when you went to Mr. Kaiser's place, is that correct?

A I got the same place back.

Q You got the same place back.

A I did.

Q What did you buy when you went to the liquor store?

A We pitched in and bought a pint of Old Taylor.

Q How much money did you have in your possession that night?

A I couldn't tell you.

Q More than a dollar?

A Yes.

Q Now, you were in the party from 9:30 until—Is that the time you arrived at the party?

A I did not say that I arrived at the party at 9:30.

Q At what time did you arrive?

A I said between 10:00 and 11:00, I think.

Q In other words, you are saying what Mr. Kaiser said, is that correct, 10:00 or 10:30?

A I am not speaking for him; I am speaking for myself.

Q All right. You just tell me what time you arrived there. What time did you arrive there, approoximately?

A I said between—I believe it would be between 10:30 and 11:00, something like that. 10:00 or 11:00, I have told you I think before.

Q Just answer the question.

A All right, sir.

Q Were you drinking when you got there?

A I had drank before I got there.

Q When you got there, were you drinking?

A You mean after I got there?

Q When you got to the party, Mr. Johnson.

A Did I drink at the party?

Q Yes.

A Yes, I drank at the party.

Q How much did you take in at this party during the course of the evening?

A How much did I take in the house?

Q How much did you drink at the party, Mr. Johnson?

A Oh, I drank quite a bit.

Q Quite a bit?

A Yes.

Q What do you mean by quite a bit, Mr. Johnson?

A Well, from the time that I was there until I left, I drank now and then there, and I drank beer.

Q And you were drinking beer, too?

A I did.

Q What else did you drink at this party?

A Well, that's all.

Q Just beer?

A Beer and alcohol.

Q What kind of alcohol? Bourbon, Scotch?

A I drank Scotch at the party.

Q And how were you drinking the Scotch at the party, Mr. Johnson?

A With coke.

Q With coke?

A That's correct.

Q Do you always drink your Scotch with coke?

A I don't usually drink Scotch.

Q You don't usually drink Scotch.

A No, I don't.

Q Did they have anything else there besides Scotch?

A That is all I seen.

Q That's all you saw?

A That's right.

Q One bottle, is that all they had that night?

A No, they had more than one bottle. They had—

Q Approximately how many bottles did they have?

A I did not count them but they were in fifths.

Q You say "they". Does that suppose there were more than two?

A That is correct.

Q Approximately how many people were at this party?

A They were coming and going. Quite a few people were in and out, and quite a few people stayed a while.

Q Did you dance that evening?

A I danced a couple of times earlier.

Q You said you left at what time, did you say?

A I didn't say I left the party.

Q Well, there came a time when you left this party.

A Yes, I did.

Q What time was it?

A Approximately 6:45 or quarter to seven, something like that.

Q How do you know it to be about quarter to seven that you left this party?

A Because I asked someone what time was it and they told me, and I told my friends that I had to work and I had better be going.

Q You can remember this?

A I do.

Q All right, sir. So, you left with whom?

A J. B. Kelley and Mr. Kaiser.

Q Did you have to help Mr. Kelley into the car?

A I didn't help him into the car. I think Mr. Kaiser and someone else who was at the party did.

Q You all got back into your automobile?

A That is right.

Q And you drove the block to where Mr. Kelley lived?

A Well, it would be, say, two blocks back because it's a one-way street and we had to go all the way around.

Q If you had walked from where the party was to Mr. Kelley's house, how many blocks would it have been?

A Three-quarters of a block.

Q Three-quarters of a block. You say distance-wise driving, it was how many blocks?

A Going back, it was approximately two blocks.

Q I don't mean to confuse you. Let's get this straight. You had to walk a half a block from the party to your car, is that right?

A That is correct.

Q And then it was two blocks back to the house?

A That is right.

Q Do you recall driving the car?

A Yes, I did. I drove—

Q You were high, is that correct?

A I was feeling good.

Q Would you say that you were intoxicated?

A No, I wouldn't.

Q Would you say you were sleepy?

A I would say I was sleepy but I wasn't intoxicated.

Q You heard Mr. Kaiser testify that you had a conversation for five or ten minutes, is that right?

A I wouldn't say it would be ten minutes; it may have been five.

Q What time would you estimate it to be at the time that you left Mr. Kaiser's place and started heading home?

A I would say it would be around about five minutes to six or six o'clock.

Q What route did you take to get home, sir?

A I went out Florida Avenue and down 11th Street, and up Nichols Avenue, down 4th Street, up Atlantic, down 6th and to Brandywine and parked across the street from my house.

Q Well, I am talking about to the gas station, what was your route?

A Florida Avenue, 11th Street, Nichols Avenue.

Q Now, was there a light there as you came to this gas station, a traffic light?

A No, there's no traffic light there.

Q Is this the only Scott's station where gas is two cents cheaper?

A Yes, this is.

Q In other words, you patronize this place quite frequently?

A No, I don't.

Q How often before January the 22nd would you say you had stopped at that gas station?

A Well, I would roughly say maybe five times, maybe.

Q Five times?

A Maybe.

Q Could it have been less than that?

A It could be less and it could be more; I'm not sure.

Q Did you say you drove into the station for a dollar's worth of gas?

A I didn't say that.

Q Well, what did you drive in for?

A I would have filled up the car probably.

Q You would have filled up the car?

A Yes, I would have.

Q Did you have enough money to cover filling up the car?

A I'm pretty sure I did.

Q Well, do you know how much money you had?

A I don't know how much money I had.

Q You don't know how much money you had?

A I don't, but I had enough to do that.

Q Well, how much did you have?

A I had ten or fifteen dollars on me.

Q You had ten or fifteen dollars.

Now, what exactly transpired, what happened when you got to the gas station?

A What happened?

Q What happened, Mr. Johnson?

A I pulled into the gas station and the attendant wasn't there. He was coming from across the street.

Q Was the lights on at the station?

A Oh, yes, the lights were on at the station.

Q He was coming from across the street, which direction? From Nichols Avenue?

A No, from some other street, I don't know the name of it.

Q All right. About how far away was he when you saw him, half a block, thirty feet? What distance?

A He was all the way on the other side of the street and I was in the middle of the gas station there. I don't know how many blocks or how many feet—

Q How long had you waited before you saw the attendant across the street?

A About maybe a minute. Maybe a minute.

Q And your windows were rolled up at this time, is that correct?

A No, I had rolled my window down when I seen the attendant coming.

Q All right. Did you call him over to the car?

A No, he came over to the car.

Q All right. What was said at that time?

A He asked me what I wanted. I told him I wanted gas. He told me he didn't have any gas.

When he told me that, I asked him what was he doing in the street, because I didn't know why he would be open without gas at that time in the morning.

Q You asked him what he was doing in the street?

A That's correct.

Q He wasn't selling gas?

A He had told me he didn't have any gas, so I was wondering why he was in the street.

Q You were curious.

A Yes.

Q What did he say?

A He told me that the lady in the phone booth, her car wouldn't start.

Q Where was the phone booth?

A The phone booth was on the other side of the gas pumps. It was two sets of gas pumps. I went to the one nearest the street and the phone booth was all the way over by the wall right by the station.

Q Could you see the phone booth?

A If I looked between the pumps.

Q But you didn't see the lady in the phone booth, is that right?

A Not until he said, "The lady in the phone booth."

Q And then you took a look and you saw her there?

A Yes.

Q Was this lady dressed in the clothes that are on this table?

A I don't know because she had a coat on.

Q She had a coat on?

A That is correct.

Q Now, what happened then? Did you get out of the car?

A No.

Q You never got out?

A No, sir.

Q Was your car locked up on the right-hand side?

A Yes, sir, it was. I had locked it when they got out of the car.

Q You just reached over and locked the door, is that right?

A I always drive with the door locked.

Q You always drive with the door locked.

A That's correct.

Q And when you leaned over to lock the door, the window was up on the passenger's side?

A Yes, sir, it was. The windows were up on both sides when I left Orleans Place.

Q Now, you had a conversation with the gas attendant. Was the woman still in the phone booth?

A Yes, she was.

Q What, if anything, did you do then while she was still in the phone booth? Did you stay in the car?

A Yes, I did.

Q Did the attendant leave?

A Leave where?

Q He was standing by the window. You had your window down.

A That is right.

Q Did he continue to remain there?

A He stood there as long as he was talking to me.

Q What was the extent of the conversation?

A He just told me the lady in the phone booth, her car wouldn't start. He asked me could I start it.

I told him I didn't have anything to start it with.

And he asked me could I push her. I said, "Well, where do I have to push her?"

He went over and asked her and he came back and told me.

Q Did she come over to the car?

A No, she did not.

Q She did not come to the car?

A No, sir.

Q You did not go near the phone booth?

A No, sir, I did not.

Q Did the gas attendant go back to where she was at the phone booth?

A Yes, he told her that I would push her.

Q Then what did you do?

A I backed out and pulled up to her car.

Q You didn't get any gas while you were there, did you?

A No, sir, I did not.

Q Did you need gas badly?

A I didn't need it that bad, but I needed it.

Q Was the needle registering on empty?

A It was registering between a fourth and empty.

Q Now, her car was parked where?

A Across the street from the gas station, on the side of the street up along the fence of St. Elizabeths.

Q What did you do after the conversation with the gas attendant?

A I told you, I backed up—

Q Just answer the question—

MR. IANNI: Objection, Your Honor.

THE COURT: Let him answer, Mr. Nunzio. He is trying to answer the question. He said he backed up and then you interrupted him.

Go ahead.

THE WITNESS: I back up to her car.

BY MR. NUNZIO:

Q You backed up to her car?

A I backed up and pulled up behind her car.

Q Was she in her car at this time?

A No, sir, she was not.

Q Did you see her walking across the street getting into her car?

A She came across the street and got in her car.

Q No conversation was had between either of you at this time?

A No, sir. The attendant was watching and he signalled to push her and that was it. He was watching the bumpers.

Q You pushed her onto the grounds, is that correct?

A That is correct.

Q Had you ever used that gate before, going into the grounds?

A Yes, sir.

Q That is gate what number?

A I don't remember the number of the gate, sir.

Q All right. So, you pushed her onto the grounds. You had your lights on, I take it, is that correct?

A Yes, sir.

Q It was still dark out, is that correct?

A It wasn't that dark but it was dusk.

Q So you had your lights on.

A Yes, sir.

Q All right. And you pushed her and just followed her where she was driving this automobile, is that correct?

A Yes, sir.

Q Approximately how far into the grounds was the car pushed by you?

A I would say from the gate to where the car is would be four normal city blocks.

Q You pushed her approximately four blocks into the grounds?

A Yes, sir.

Q And it was dusk so you recognized the building, not the name of the building but the building and the parking lot; is that correct?

A Yes, sir.

Q There were no other cars about when you had stopped pushing her, is that correct?

A There was a car parked on each side of her and cars were coming and going from the left.

Q At that time of the morning?

A Yes, sir.

Q Did she signal you when she was intending to stop her car?

A No, sir. She just pulled up and stopped.

Q Well, you were pushing her. You were right behind her, flush behind her.

A But I was not pushing her fast and instinct would tell you that she was parking there.

Q All right. But you were right behind her, is that correct?

A That is correct, and I seen her brake lights.

Q And there came a time when she stopped, is that correct?

A That is correct.

Q And you were right behind her at this time, is that correct?

A When she stopped, I was right behind her.

Q And she got out of her car?

A Well, when she got out of her car, I was backing up.

Q You were backing up.

A Yes, sir.

Q Were you backing up to the left or to the right?

A To the right.

Q To the right.

A Yes, sir.

Q You were cutting your wheels this way (indicating)?

A I backed around like this (indicating), just like that.

Q And she was still in her car at the time that you were backing up?

A Well, when I looked again, she was out and she was walking over to my car. I had pulled up behind her car and she was walking over to my car, and she stopped me.

Q How did she stop you?

A She was just coming over there and I asked her if it was all right.

She said, yes but she didn't know how she was going to get it started that evening.

Q Well, now, wait a minute. Wait a minute. Was your

car still moving when you saw her coming over?

A I was going into first gear. I had a standard shift car.

Q So, you were getting ready to move out?

A Right.

Q And it is your testimony that you then reached over and rolled the windows down?

A I rolled the window down after she stopped me.

Q How far did you roll down the window?

A I rolled it all the way down.

Q All the way down.

A Yes, sir.

Q And how did you describe her leaning on the car?

A In this manner, some way like this (indicating), her handbag and everything.

MR. IANNI: May the record show that he has his arms covered on one another and in a manner in which the upper part of his body would lean on his elbow.

THE COURT: Do you agree with that, Mr. Nunzio?

MR. NUNZIO: Yes, Your Honor.

THE COURT: All right. Let us keep going then.

BY MR. NUNZIO:

Q What did she say at this time?

A She told me that she didn't know how she was going to get her car started that evening and she asked me would I come back and start it. And I told her I had to work and I didn't think I would be able to come back and start it. And I told her to call a gas station.

She said there probably wouldn't be any gas station open.

I said, "With all these gas stations around here, probably one will be open. You can call them and they will probably come and start your car."

And then she said, "Well, can't you come back and start it?"

I kept telling her I couldn't and she threw her keys on the seat and—

Q You are saying now that you kept saying you couldn't.

A That is correct.

Q How many times did she ask you to come back to fix her car?

A She didn't say fix her car.

Q To start it.

A I know at least two times before she threw the keys on the seat.

Q She threw the keys on the seat. Then what did she do?

A What did she do?

Q Yes.

A She told me to come back and start the car, and I didn't touch the keys. I told her—

Q Did you see her going into her purse for her keys?

A Well, I don't know—She had her hand up by her purse; I don't know whether she had put them in there or not, or whether she took them out or what but her hand was by her purse.

Q Well, you said she was leaning on the car with her hands overlapped—

A I didn't say they were overlapped; I said they were in this manner (indicating).

Q All right. Well, that's one palm on the window and the other palm resting—

A In a manner similar to this (indicating).

Q In a manner similar—

A Similar to this (indicating).

Q You saw both of her hands?

A I could see her hands, and she had her purse. Now, it could be this way, that way—

Q Well, now, where was her purse?

MR. IANNI: Objection, Your Honor. Mr. Nunzio refuses to let the man answer the questions.

MR. NUNZIO: The witness is volunteering, Your Honor, beyond the point and I am trying to clarify this.

THE COURT: But still let him finish his story. When he starts, let him finish.

MR. NUNZIO: Yes, Your Honor. I will let him finish his story.

THE COURT: Ask him questions.

Mr. Johnson, don't volunteer and see if we can keep this thing in order.

BY MR. NUNZIO:

Q Now, you saw her leaning on the window of the car, according to your testimony, in the manner that you have described. Are you now telling us she could have had her hands in another position other than the way you have described for the record?

A I am telling you I could see her hands and I could see her purse.

Q Well, where was her purse that you were able to see it?

A It was up in the window along with the rest of her hands.

Q Was it a hand purse or a handbag type?

A Well, I didn't notice that much about it.

Q Well, was it hanging over her arm?

A It could have been; I'm not sure.

Q Well, if she had the purse hanging over her arm and she was leaning on the car and the car window was all the way down, you were able to see beyond the door to see the purse?

A The purse could have been hanging on her arm and it could have been hanging inside the door.

Q Inside the door—

A It could have been.

Q All right. Do you recall seeing the purse inside the door then?

A I recall seeing the purse.

Q Did you see her taking the keys out of the purse?

A I told you they were near the purse; whether they were put in it or not, I don't know.

Q You recall picking up two keys off your car seat that were loose, they were not tied together; is that right?

A I am pretty sure they were loose.

Q They were loose.

A I am pretty sure they were.

Q Well, now, you picked them up and you carried them and you had them in your possession from approximately

1:00 o'clock, according to your testimony, until 2:30 that afternoon. Now, were they in fact loose or not?

A They were loose when I gave them to Detective Wesley.

Q All right. They were loose then. You had no occasion to couple them together at any time, now, did you?

A I don't think I did.

Q Then she threw two loose keys on the seat of the car, is that correct?

A She did.

THE COURT: We will take a short recess at this point.

(Whereupon, at 3:05 p.m. a recess was taken.

BY MR. NUNZIO:

Q With which hand, sir, did she throw the keys onto the car seat?

A I don't know, sir.

Q Did you see her go into her purse at all?

A She had her hands up by her purse. I don't know whether she went in it or not.

Q Did she have gloves on?

A I don't know.

Q You were present when the police recovered a pair of gloves that she identified as hers, were you not?

A That is correct.

Q In the back of your car, is that right?

A Right.

Q Did you see her drop her gloves in your car?

A No, sir, I did not.

Q If she had dropped them, from where you were sitting and looking at her, could you have seen the gloves drop on the floor?

A I may or I may not.

Q Well, at any time other than throwing the keys on your front seat there, did she make any gesture of throwing something in the car?

A No, sir.

Q You were present in fact, though, when the police recovered this pair of gloves from your car?

A Yes, sir.

Q And they were taken from the back seat area?

A They were taken from the back seat area.

Q The floor board behind the passenger's side, is that correct?

A That is correct.

Q Now, she wanted you to come back and fix her car, — is that correct, to start it?

A Yes, to start it.

Q Now, what exactly did she say, as best you can recall?

A Just like I explained it to you, sir, she said, "Could you come back and start it?"

Q What did you say to that?

A I told her I didn't have anything to start it with.

Q What did she say after that?

A She just told me to come back and start it.

And I told her I may be able to borrow a booster cable from my boss.

Q What did she say to this?

A Well, she didn't say anything that I know of. She said okay, I guess, because she had already gave me keys. That's when I said that.

Q In other words, this conversation concerning your getting car cables was after she had thrown the keys on the front seat, is that correct?

A That is correct.

Q Was she walking away at this time?

A Well, she had stood up back from the car after she threw the keys in there.

Q She backed away from the car?

A That is right.

Q How far away did she back up?

A Well, she stood up.

Q At this time, you did not touch the keys, is that correct?

A No, sir, I did not.

Q And you told her you would get some car cables?

A I told her I would try.

Q What did she say to this?

A Like I told you, I can't remember what she said. She must have said okay or something, because she didn't take the keys out of the car. I wanted her to take the keys out of the car.

Q Did you tell her?

A I told her that I didn't need the keys and I wasn't going to touch her car.

Q You told her you didn't need the keys—

A I told her to keep her keys, that I was not going to touch her car.

Q In fact, you don't need the keys to start a car with jumpercables, isn't that true?

A Oh, yes. Jumper cables are only from one battery to the other. Somebody has to be in the other car and somebody has to be in the car that's going to start it.

Q Well, you told her you didn't need the keys to start the car.

A That's right. But I wasn't going to touch it.

Q But you do need keys to start the car?

A Yes, if you are going to start it, but I wasn't going to start it unless the lady was there.

Q What did she say to your remark that you didn't need the keys?

A Well, she didn't take them out of the car.

Q She was standing up at this time, is that correct?

A She was standing up.

Q What did she say to this?

A To this what, standing up?

Q "I don't need the keys."

A Well, she just told me to keep them and come back and start her car.

Q Then what did she do?

A What did who do?

Q The woman.

A She was standing there and I just drove on away. I was sleepy.

Q Well, when did you give her your name and your telephone number?

A I gave her that when she gave me the keys, because I told her—

Q Well, what did you say to her?

A When she gave me the keys, I told her if I was asleep, she could call me at that number because I figured—

Q Did you give her your name?

A Yes.

Q What name did you give her?

A Barrington.

Q Barrington what?

A That's it. That's all I wrote—that's all I told her.

Q That's all you wrote?

A I did not write; I told her.

Q Oh, you did not write?

A No.

Q You said you wrote but you did not write.

A I did not say that. I said I told her.

Q You told her, "Barrington."

A That is what I told her.

Q You didn't say "Johnson"?

A No, I didn't.

Q You didn't say "Charles"?

A No. I don't know any Charles.

Q But you didn't say "Charles"?

A I don't know any Charles.

Q I asked you, you didn't say "Charles"?

A I did not say "Charles."

Q Well, did you see her write anything down?

A I seen her doing something; I don't know what she—

Q Well, where was she when you saw her doing something?

A She was right there at the car window.

Q Did you see her go into her purse?

A I did not exactly see her go into her purse—

Q Exactly what—

MR. IANNI: Objection, Your Honor. He still won't let that man answer the questions.

MR. NUNZIO: Your Honor, I apologize for this last one.

THE COURT: When you ask him a question, give him a chance to finish his answer.

MR. NUNZIO: Yes, Your Honor.

BY MR. NUNZIO:

Q Well, now, Mr. Johnson, when in the sequence of events did you give her your name and telephone number?

A While she was standing there at the car.

Q But not leaning on it?

A I don't think she was leaning on it. She had backed away, because she had gave me the keys.

Q What exactly did you say to her concerning your name and telephone number?

A I told her my name was Barrington and if I was sleeping, she could call me at that number.

Q What number?

A 561-6239.

Q Did you tell her that number?

A Yes, sir, I did.

Q Did you see her writing it down?

A I seen her doing something. I don't know what the lady was writing or what she was doing.

Q Well, now, you said it was light out, it was dusk, you could see. You saw her back away from the car. Did you see her go into the purse?

A I don't know whether she went into the purse or not, or whether she did whatever she had to do right there or what.

Q Did she ask you to repeat the number?

A No, sir, she did not.

Q Tell us exactly how you gave the number to her on that occasion.

A Well, I didn't say it fast.

Q How did you say it?

A I said, "561-6239."

Q And then what did she do after you had said this?

A She did something. I don't know what she did but then I drove on away.

Q Was her back turned to you at the time when you said she did something and you couldn't see what she was doing?

A Well, I left the lady standing behind her car and my car was backed up just like this (indicating) and her car was right here, and I drove on off.

Q You left her standing there?

A Behind her car and—

Q You wanted to get away from her?

A Did I want to do what?

Q You wanted to get away from her?

A She had finished her conversation with me. I didn't want the keys.

Q Did you see her lock her car before she came to you?

A No, sir, I did not.

Q When you drove away, you did not want her keys?

A No, sir, I did not.

Q It's your testimony you did not see her go into the building?

A No, sir, I did not.

Q About what time was it when you drove away then, Mr. Johnson?

A I would say it was roughly around 6:30 or 6:35—maybe 6:45, maybe. I would say around 6:45, I guess.

Q Did she appear nervous at the time that she was talking to you?

A I didn't notice. I don't guess she did.

Q Did she appear upset at the time when she was talking to you concerning the keys and starting the car?

A Well, she may have been upset about—

Q I said, Did she appear from what you could observe.

MR. IANNI: Your Honor, he was going to answer the question and Mr. Nunzio stopped him. I think the jury ought to hear that answer.

MR. NUNZIO: All right. Please.

THE COURT: Let him answer the question.

THE WITNESS: Well, I don't know what the question was now.

MR. NUNZIO: Would you read back the question, please, Miss Sanche?

(The pending question was read as follows: "Did she appear upset at that time when she was talking to you concerning the keys and starting the car?")

THE WITNESS: Well, I don't know what appear upset would be because—I mean, I just look at a person and I say they're normal. I don't know upset from anything else.

BY MR. NUNZIO:

Q You don't know upset at all?

A I mean, I didn't try to psychoanalyze or whatever you would say about this lady. I mean I'm not a doctor or anything. I don't know upset or anything; I just looked at the lady as if she was normal.

Q Let me ask you this: Did you consider it strange that she would just throw her keys in to you?

A Yes, I did.

Q Did you consider it strange that she would insist that you start her car?

A Yes, I did.

Q But you thought nothing of this though?

A I was trying to get home and get some sleep.

Q How did you leave the grounds, what gate?

A The same way I pushed her in.

Q The same gate?

A Yes, sir.

Q Now, you had been on and off the grounds enough to know that there is a trip rail over Gate No. 4, isn't that correct?

A There is a trip-rail over the main gate. I don't know what number it is.

Q You went directly home and went inside the house and saw Miss Tyndle?

A Miss Tyndle, yes.

Q And you went straight to bed?

A That is right.

Q What type of work were you doing for Henry's Fuel Oil in January?

A What type of work?

Q Yes. What type of work?

A I was delivering oil. Sometimes I would work in the office in the morning and get the trucks out. If I went to work on, say, a Saturday and nobody was there but Mr. Cox to open up, I would get the trucks out.

Q Normally, when you went out on a run, what type of work did that encompass? What did you have to do with respect to going out on a run?

A Put oil in houses.

Q In other words, you had to work with hoses and couplings to transfer oil into the houses, is that correct?

A Yes, sir.

Q Did you wear work clothes or cover clothes for that?

A Coveralls, such as Mr. Cox had on. The company furnished them for us.

Q Of course.

Now, you went to work approximately what time that morning?

A I got there, say, between 10:30 and 11:00.

Q Before you went to work, you had placed a telephone call, is that correct?

A That is correct.

Q And prior to that—and you were present when Miss Tyndle testified—she said that you came in that morning and told her to remind you that you had to go to work; is that correct?

A Yes, sir.

Q Do you recall telling her that?

A Yes, sir, I do.

Q All right. You didn't undress when you went to bed?

A No, sir. I didn't go to bed; I laid across the bed.

Q Well, you went to sleep?

A Yes, sir.

Q When did you place the call to Henry's Fuel Company after you were awakened by Miss Tyndle?

A At approximately 10:15.

Q Was she still in the house?

A Who?

Q Miss Tyndle.

A Yes, she was.

Q Where was the phone located?

A The one I used is in the kitchen on the wall.

Q Where is the other one?

A In the bedroom.

Q Now, it is your testimony she awakened you and you went into the kitchen at about 10:15 and placed a call; is that correct?

A That is correct.

Q And you talked to Mr. Henry?

A Yes, sir, Mr. Henry hisself.

Q And you asked about what?

A First, I asked him did he have anything, which means did he have any run outs. He said no, he didn't.

I said: "Well, I will be right out and I would like to use your battery cables."

Q Were you still feeling pretty high at this point?

A I was sick then. At that time, I was feeling drowsy and sick.

Q Now, what do you mean with respect to calling Mr. Henry and asking him if there was anything at this time?

A Any run outs in oil. If somebody's house that they are supposed to keep it with oil may have ran out, and I was the one who would have to take it.

Q Now, do you get paid for the time that you check in or on the runs that you make?

A Well, if it is warm and you just keep in touch with him, he will pay you then; but if it's cold, he wants you there and you have to run.

Q In other words, it is your testimony that as long as you check in and if there are no runs, you still get paid?

A Well, he will give you a few hours for that.

Q But, theoretically, you don't get paid for that complete time; is that what you mean?

A No, because we have a clock and unless he tells you otherwise, you didn't.

Q In other words, at Mr. Henry's, you have got to punch the clock before you start getting paid?

A Yes. Well, they sign you in. Sometimes, the clock doesn't work so they sign you in.

Q So, you are signed in, is that correct?

A That is correct.

Q Did you sign in that morning?

A I don't remember. He knew I was present though.

Q Well, did you punch the clock?

A I don't remember whether I did or not.

Q Did you punch out that day?

A No, I did not. I remember that I left. He told me I could go ahead.

Q Who told you you could go ahead?

A Mr. Henry did.

Q Well, were you in fact paid for that day?

A Right now, I can't remember whether I was paid for that day or not but I know I had to hang around, so undoubtedly he had to pay me for that day.

Q But, it is your testimony you don't know whether the clock was working that Sunday?

A I don't know whether I hit it if it was working, but it's a lady in the office—

Q In other words, even though it is working, you are directed to punch the clock—

MR. IANNI: He still won't let him finish the answer, Your Honor.

MR. NUNZIO: I think I have, Your Honor.

THE COURT: Go ahead.

BY MR. NUNZIO:

Q So that we may understand each other, as well as the Court and the jury, even when the clock is working, you have to be directed to punch that clock in order to start getting paid; is that correct?

A The drivers that work full time are.

Q We are aware of that, but you are a part time worker.

A That is right.

Q In other words, as a part time worker, when there is a run and the clock is working, the boss then directs you to punch the clock and you start getting paid from that point on; isn't that correct?

A Yes. He doesn't direct it but I will straighten it up with the lady in the office. I will tell her that I didn't punch in that day and I was in.

Q But, you normally don't get paid until you—

A Until I straighten it up with the lady in the office that makes up the payroll.

Q Did you make any runs that Sunday?

A No, I was just told to stick around for a while.

Q Now, what time did you ask the boss for the battery cables?

A Well, I put them in the car before he told me I could go. I mean, I did that right after I got there, I would say.

Q Well, now, when you left the grounds of St. Elizabeths Hospital on the morning of January the 22nd, you had no intention of coming back; is that what you are telling us?

A What do you mean by that?

Q When you left that lady standing there by her car, was it your intention to return?

A I wouldn't have if she wouldn't have put the keys in the car. The only reason I did was because she put the keys in the car.

Q You didn't bother to circle around and come back and throw the keys in the car?

A In whose car?

Q The lady's car.

A I wasn't going to mess around on St. Elizabeth's lot.

Q Did you ever find out what her name was?

A Only through papers from the Court.

Q I mean on that date, did she ever say what her name was?

A Well, if she did, I didn't remember it.

Q All right. Now, you put the car cables in the trunk of your car, is that correct?

A Yes.

Q After you had asked Mr. Henry for them, is that correct?

A Yes.

Q What time did you leave Henry's Fuel Oil Company that afternoon?

A I would say between 1:30 and 2:00, approximately.

Q How far was it from Henry's Fuel Company to this parking lot at St. Elizabeths Hospital?

A I did not go to the parking lot at St. Elizabeths Hospital when I left the Henry Fuel Company.

Q I am asking you how far it is. I know you didn't go there. I am asking you what the distance is from Henry's Fuel Company to St. Elizabeths parking lot.

A I couldn't tell you. It's a good distance.

Q You left work at approximately what time?

A I would say between 1:30 and 2:00, or 1:00 and 2:00—somewhere in that time.

THE COURT: Could I ask counsel to come to the Bench a moment, please.

(AT THE BENCH:)

THE COURT: I hate to interrupt cross-examination, but I have to go to a meeting. So, we will recess until Monday.

MR. NUNZIO: Yes, Your Honor.

(IN OPEN COURT:)

THE COURT: Ladies and gentlemen of the jury, we are going to have to recess now until Monday morning. I am sorry but I have another engagement which I must attend.

You have a long week end ahead of you, so don't be talking about this case with your family or friends or with anyone else and do not talk about it amongst yourselves.

We will reconvene at 10:00 on Monday morning.

(Whereupon, at 3:30 p.m., the trial in the above-entitled matter was recessed until 10:00 a.m. on Monday, January 22, 1968.)

REPORTER'S CERTIFICATE

(omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 335-67

UNITED STATES OF AMERICA

vs.

BARRINGTON JOSEPH JOHNSON,

*Defendant.*

Washington, D.C.

January 22, 1968.

The above-entitled cause came on for further trial before the HONORABLE HOWARD F. CORCORAN, United States District Judge, and a jury, at 10:22 a.m.

APPEARANCES:

NICHOLAS NUNZIO,
Assistant U.S. Attorney
Counsel for the Government.

SAMUEL F. IANNI, ESQ.,
Counsel for the Defendant.

Arguments of Counsel.

PROCEEDINGS

* * * * * * * * * * *

MR. NUNZIO: May it please the Court, ladies and gentlemen of the jury: We have reached that point in the trial where the counsel have an opportunity, under our system of law, to address the jury. It is called arguments, sometimes summations. It is nothing more than an opportunity for counsel to give you the benefit of their working knowledge of the case.

Of course, you have to decide the facts. It is an attempt to assist you in your deliberations.

What we say about the facts is not the law. The Court instructs you on the law. We would highlight our own case

in an attempt to show you, the Government and the defense, what is true or not true in this case.

Your Honor, may I reserve about 12 to 15 minutes? If I may be notified.

Now, the Court will read an extended form of the law in the case, ladies and gentlemen, and you are bound by the law that the Court instructs you on.

Of course, counsel have a right to comment as to the law.

The facts we will comment on, but if we go astray on the facts, your recollection is what is binding, not counsel's, because you heard the testimony, you are the triers of the facts under our system of law.

This case has testimony which is evidence, that is, tangible and demonstrative evidence. Let us first speak as to the Court's instruction on the credibility of witnesses, because this is the instruction of law which will instruct you, in effect, that you may, if you wish, disbelieve in whole or in part the testimony of any witness that has testified falsely as to a material fact of, which he or she could not have reasonably been mistaken.

In other words, someone that has distorted the truth. If you feel that a witness has testified, distorted, testified to something knowingly which they could not have been mistaken about, you may, in your discretion as jurors, disregard that testimony.

In other words, give it no credence, or accept some of it, part of it, it's up to you.

This is important, because many witnesses have taken this stand. Credibility is at stake here. More than credibility, the Government and the defense have introduced other evidence, exhibits, in the case.

The Court will further tell you that the way a witness testifies on the stand, his demeanor, is taken into consideration in a case. Does the witness hedge? Is there hesitancy? This is part of credibility, too. Pay attention to this instruction, I ask you, please.

Let us go, then, to what the Government considers it has proven based upon the evidence:

That, I think, is material, or what I believe or think, according to the evidence, is what I talk to you about.

What has the Government presented to you?

Mrs. Mayes took the stand. She testified that she was the mother of three children, working at the hospital since 1959. She had left the cooking service, I believe, and now is in the nursing aid training program.

She had left for work that morning. She was due at the hospital, I believe Mrs. Fushee enforced the time of employment, 7:00 to 3:00 or 3:30. She was on her way to work.

She testified that, and readily admits, she had relations with her husband the night before, 10:00 o'clock. She testified that she had cleaned herself, and she had placed new undergarments on that morning. This is relevant. Ten o'clock the relationship, the following morning came and she put on clean undergarments.

And she testified that she went to work, and the car broke down at a gas station, and she went to the attendant across the street. And the man was there, and he volunteered his service to push her.

She called her husband. The man was there, standing nearby, she told her husband the man was going to push her or help her start the car. And then she went to her car, and this man proceeded to push her.

Then she testified that when she got onto the grounds of the hospital, the man came over and pushed her in her car. She wouldn't move over, and he pulled her out of that car, grabbed her arm, and pushed her into his car, on the driver's side.

She testified that she had a thyroid condition. She testified that this man came in Gate 3 and left out at Gate 4, that the light was green. He went straight through, still holding on to her.

There came a time when this individual wanted gas, and he put his arm around her neck. I believe you will recall her testimony that she could barely breathe, she couldn't breathe, she had a thyroid condition and had not been operated on yet.

She testified she was in fear, she was scared, but not just scared—this is a rape charge—she was afraid for her life, afraid for her life, and she so testified.

She testified that she was afraid for her life, she thought he was going to kill her before the alleged or the sexual

assault, during the sexual assault and after the sexual assault. She was in fear for her life. This individual had her, when he left the grounds, going around Gate 4, had his arm around her neck. At the gas station, too.

He took her to some isolated spot, no cars in the road, no buildings around. He talked to her. "Your name, are you married?" "Do you love your husband?" "Don't you love your husband, don't you?"

She said, "I told you to take off things," he said to her, according to her testimony. And as he went for her, she said she would do it.

He then pushed her down on the seat, her head by the wheel, pushed her undergarments and her dress up and had relations with her.

Is this acquiescence? Did she consent to the sexual act? She was in fear.

The Court will instruct you as to threats of force and violence. This certainly is important to a rape case, and this the Government must prove. Listen to the Court's instruction as to the rape. But also listen to the Court's instruction when there is acquiescence, in other words, a giving-in.

Is this a giving-in, because someone doesn't care? Is this a giving-in that does not constitute rape? Or is it an acquiescence, a giving-in, because you are placed in fear of great bodily harm or death?

She testified she was in fear for her life. She wasn't just scared, she was in fear for her life.

The defense says, on cross-examination, "Why didn't you just scream out?"

Where was she, ladies and gentlemen? Where was she at this time? In a lonely, deserted area with a man she didn't know who, as a good samaritan initially offered to push her car, and pulls her from her car, pushes her in his car, and takes her to a desolate spot.

She testified she was in fear for her life. She thought he was going to kill her even afterwards.

This is acquiescence? I submit to you, based upon the testimony, acquiescence because of her fear of death or great bodily harm. He didn't pull out a knife, no. He

didn't pull out a gun. But he had other weapons, a lonely street aided and abetted this man that morning, the darkness of the morning aided and abetted this man that morning. These were his weapons. An isolated area, the darkness, the windows rolled up. She was a lonely soul. Yes, she took her things off, her underthings off. She was in fear for her life, not just scared, in fear for her life.

She testified that she thought this man was going to kill her. Because he did not, because he did not beat her, does this, then, void rape?

You are reasonable people. Are these the actions of a woman who acquiesced in a sexual act? Who was to say that she should have screamed on a desolate street in nowhere when this was going on? Who is to say that she should have struggled more than what she did in a desolate spot in a car that was locked, her windows closed, with no one around except the darkness and the loneliness? Who was to come to aid her?

I submit she acquiesced because—because of the fear of death, fear of grave bodily harm. And he did exercise some force, let's not forget, perhaps it was a twist of the arm. "Don't scream, I won't hurt you." Is this a conversation or a threat?

This was a woman who was the mother of three children. I submit it was rape.

And she testified further that she was taken home—rather, back to the hospital, and back there he gave her a piece of paper, and he said, "You will probably call the police," according to her testimony. She said, "No, I won't; no, I won't."

He said, "If you would let me come back, I will help fix your car," and wrote his name down, according to her testimony. The paper is lost, not through her fault, she turned it over immediately to the police. The name Charles was written on it. Several officers testified to that. And the number, he told her not to look around to get the tag number, according to the testimony, if you want to believe it.

Is her testimony incredible, or is she telling it as it actually happened?

She did not look back. She went straight in, and what did she testify to?

She got inside about 7:30. This is confirmed, the time, by Mrs. Fushee, whom the defense called. The guards alerted her, and she came down about 7:35.

She didn't walk in and say, "I want to leave today, I don't think I can work." She didn't say that.

Her demeanor on the stand, a quiet woman—a quiet woman—who had been through the ordeal of being sexually attacked, "I can't perform my duties." Mrs. Fushee knew her. She knew something was wrong. There were people around. This was the defense witness.

So she took her into the back room to talk to her, and the woman cried. She told her what had happened, and immediately reported it—immediately reporting—which means, if you do believe her, that the man who dropped her off, dropped her off at 7:30, not as the defendant testified to before 7:00 o'clock.

What else corroborates her story?

Her undergarments, her pants, spermatozoa, not semen, spermatozoa, positive identification that a male reproductive organ had caused the deposit.

What else? If you are to believe her, she testified, too, that this man was on top of her having relations.

This suit, except for being pressed, this is what she wore to work that day (indicating the exhibit), dressed in a two-piece suit and a blouse. These are the pieces of clothing of a woman that is going to work.

What did the FBI evidence show?

The evidence showed that this sweater, this angora sweater with its loose hairs, you may examine these—the hair and fibers on her clothing could have originated with this sweater.

Does that corroborate her story? Does that lend credence to what she said?

This is what she testified to. It wasn't only on the suit, it was on the blouse, on several other things. This was the FBI testimony, an expert who testified to this.

She told the police, she identified the man that day.

But what's more, she testified the man took the keys from her. "I'll come back and fix your car, but you would call the police." "No," she said, "No." So he had the keys. She

identified those keys for you. Her gloves were found in that car.

The complete defense to this case is not that she consented to having sexual relations with him, that is not a consent defense, because that is one of the defenses to rape, the woman consented.

The point is that he asked for the keys. She said, still in fear for her life, she surrenders the keys.

All of the evidence tends to corroborate her.

What did the defendant tell you? She was never in the car, never in the car, he never got out of his car. He saw the attendant coming across the street. That's when he first saw what was going on. The station attendant sells him gas. He had none. He pushed this woman. He didn't want her keys. She leaned on the window, he rolled it down.

Is his testimony credible? Has anybody impeached Mr. Aldrich, the gas station attendant? He didn't see anything that went on except what he testified to.

He saw the man over by the cigarette machine. There was no testimony that he bought cigarettes. And if he doesn't smoke, so what? I submit to you, so what? I submit the evidence shows he had his victim pointed out. He had his prey.

She testified the man was by the phone when she called her husband, and that's exactly where Mr. Aldrich put him because the cigarette machine was by the phone.

Mr. Aldrich saw him working under the hood.

How does he testify that the sweater got mixed up with her clothing? The police had the bag on the desk, a suit similar to this—a suit only similar. Saying the police mixed them up, the FBI mixed up the evidence (indicating the exhibits). The sweater—the other things were wrapped before the sweater was even near the precinct.

As to the telephone number, what did she do? She said the man wrote it and gave it to her. Is she to be penalized because the numbers, in fact, on the paper, as testified to by the police officer, were the same; but because of cross-indexing, they came out with a different person.

But she surrendered the paper. Is she credible? Is she credible? The point is she said she did not write it but that the defendant wrote it. And everyone testified who saw the paper that "Charles" was on it.

Let's go to her credibility. She surrendered that piece of paper, gave it to the police. That afternoon they had the defendant.

You heard the testimony only recently that they checked that number. He testified he never wrote it. I submit that the evidence shows the corroboration of this rape. Her testimony, her gloves in the car puts her in the car.

The hair and fibers on her clothing. That, he says, in no way could have been mixed up. His denial of ever getting into the car, or her getting into the car.

As to the undershorts, first he said he changed everything that Saturday. Then, all of a sudden, he said it must have been that Friday, and then he doesn't remember when, exactly, he did change that underwear. Why couldn't he remember? Because, all of a sudden, I submit to you, the defendant realized there was spermatozoa on those shorts. But he testified he had relations with his wife in bed without the shorts on.

I submit that the evidence corroborates her story, that it happened as she testified.

The defense questioned her as though it was consent, and, yet, the defendant denies even being there.

What does he say throughout the questioning he propounds, the questions propounded to the woman and the man? "Did you scream, did you holler, did he have a knife?" This man says he wasn't ever there, didn't even do it!

In other words, he didn't do it, but if he did do it, she consented to it. That's what they are saying.

Was she a credible witness? Did she testify falsely to a material fact of which she could not have been mistaken? Because if you are to believe the defendant, this woman conjured the entire thing in her mind, for half an hour after he let her out of the car, by the defense testimony, at 7:00 o'clock, she walked around dreaming up this story. What else could you conclude based upon the defendant's testimony?

The FBI, were they in error when they said the hair and fiber came from him?

The gloves in the car, did she drop them there as the defendant would have you believe? The telephone number that he wrote—or did she write it?

Her story is corroborated, ladies and gentlemen, and I ask you to return a verdict finding this man guilty as charged.

MR. IANNI: Ladies and gentlemen of the jury, I know you must be tired, because I'm tired, but I believe I owe my client over there, Barrington Johnson, a duty. I think I owe this Court a duty. I think I owe you ladies and gentlemen of the jury a duty to comment a little bit about what is going on or has been going on and about the evidence that has been produced here.

Before I start, I want you to know one thing: I am going to say certain things as to what I thought I heard here. If what I say I thought I heard conflicts with what you did hear, disregard what I thought I heard. It's what you all heard at this point, or even before this point, that counts, though, keeping that in mind, I'm going to make some comments about what's been going on.

Somebody once said—I just don't know who—that rape is a very easy charge to be made, but a very hard charge for a defendant to defend against. I think you have been sitting here these last few days realizing that.

One more thing: I'm going to argue consent, and I'm going to argue consent because, of course, there is evidence of it, but I don't concede one second that the act of intercourse took place. I want you to understand that. The defendant has this right.

Now, one more thing: The defendant doesn't have to prove he is innocent. He doesn't have to prove that. It is up to the Government to prove that he is guilty. However, I think before I'm done, I'm going to prove to you that he's innocent.

One further point: I'm at a little disadvantage because this is the last chance I'm going to have to talk to you.

So, in my closing argument to you, I'm not only going to try to convince you of all of this, but I'm going to attempt to anticipate a few things that Mr. Nunzio may come back to.

Now, has the Government proven the charge that Mrs. Mayes forcibly, forcibly and against her will, by Mr. Johnson, that he had intercourse with her?

Now, what do we have? Of course, we have Mrs. Mayes'

testimony. You heard her testify, and I have no reason to dispute that Mrs. Mayes is a good worker. In fact, I think she's probably a very fine worker. I think she wanted this job very badly, because you probably heard the same thing that I heard, that she was on probation. And she said this about four, five or six times. This was a big thing to her. And it was important to her that she get this job. That might be one reason to say she acted the way she did.

Now, what is her testimony, and does her testimony coincide with what the other testimony is?

She testified that she got to the gas station when the car broke down, she went to the attendant, the attendant came out and looked at her car—and looked at her car.

Did Mr. Aldrich verify that? Huh-uh. Mr. Aldrich didn't say that. Mr. Aldrich said, "I never left that gas station."

Then she said that after the attendant, and Mr. Aldrich is the only attendant, after he looked at the car and told her that he thought she had a dead battery, she went to call her husband. And while she was in the phone booth, Mr. Johnson came upon the scene.

Did Mr. Aldrich say that? Huh-uh. Mr. Aldrich says, "Oh, no, Mr. Johnson was already there before Mrs. Mayes even came."

Mr. Nunzio has made a couple of points now about darkness.

Mr. Aldrich doesn't say it was dark. He says it was light.

Now, Mr. Aldrich—I always put little names on cases in my office, and I guess this one I am going to call "The case of the dollar's worth of gasoline," because Mr. Johnson, according to the Government's story, is said to have purchased a dollar's worth of gasoline at two different times.

If you believe Mr. Aldrich's testimony that he sold him a dollar's worth of gas, how are you going to believe Mrs. Mayes' testimony later on that he stopped for a dollar's worth of gasoline on his way to do the act that he is supposed to have done? This is either the biggest gasoline guy that ever was or his car was using up so much gasoline that he can't even go around the Beltway.

Ladies and gentlemen of the jury, we don't dispute that Mr. Johnson came up, he pushed Mrs. Mayes. We don't

dispute that. He pushed her over to where she wanted to go. We won't dispute that.

One thing I would like to point out, when he got to the spot—you see, they have got to make Mr. Johnson out to be a real sinister guy. This is a terrible crime, in most person's opinion, this is one of the worst crimes you can have. You have got to make him out to be a real rat.

How does it start to build up? It starts to build up when Mrs. Mayes said, "We almost got to the place where we were parked and stopped, and I had to roll down my window to ask him, 'Aren't you going to push me the whole way?'" He says, "There's some lights blinding me."

Then she has you to believe that he waited there, and that person got away—after all, he had this old friend in his mind, and only after that person left did he push her into the spot.

You know, on cross-examination on this point right here something came up very innocently, I don't know whether you heard it, but Mr. Johnson on some questions Mr. Nunzio asked him, he says there were a number of cars in this parking lot. There were a number of people coming and going. And it seems logical that there would be. After all, Mrs. Mayes was going to work. She certainly wasn't the only person who was reporting to work that day and at that time.

It is logical to assume that there was activity there. There were other people coming and going. He is the first person that said that.

Now, then, don't forget now Johnson's a bad man, but they all give him credit for being smart.

What does Mrs. Mayes first say he attempted to do? "To push me in my car."

Now, Johnson knew that car couldn't run. Now he is going to push her in his car. That means he had to commit the act that they later accused him of committing right there, and it was only after he couldn't push her in his car that he pulled her out of the car, out of her car, into his.

Now, if he was going to commit the act right there, which they believed first, why did he drive away? Give him credit for being a logical man. Why did he drive away?

Why didn't he do what she wants you to believe he did right there? I don't know.

And I think that Mrs. Mayes, during her entire testimony, wants you to believe her story, and I get also the idea that she will tell you anything for you to believe her story. And why do I say that? Because of conflicts in her testimony.

You recall I asked her whether or not his car was running, she said, yes, positively, just like that. Yet, we know that sometime in the past she didn't know whether the car was running. Recall that?

Also, she wants you to believe her story. You recall I asked her on cross-examination whether or not she first asked Mrs. Fushee for annual leave, for leave; emphatically she said no, she did not. Yet, Mrs. Fushee came in and testified that she did ask for her leave. That isn't much of a conflict, but it's difficult to get hard conflicts in anybody's testimony.

But this gives me the idea that she wants to convince you, and she will say anything to try to convince anybody that this actually occurred.

Now, was she put in fear? I just don't know, and I don't pretend to be a brave person, Lord only knows I am not, but I just don't know how Mrs. Fushee could be in fear of her life—I'm sorry—not Mrs. Fushee, how Mrs. Mayes could be in fear of her life; by her testimony, he had no weapon. You saw the people here today. There isn't much difference in size between the two of them. He is certainly not such a big person that size would overwhelm you and make you afraid of him.

In fact, according to her testimony, he never said anything other than he wouldn't hurt her. He never said anything other than he wouldn't hurt her.

He took her into his car. There's no evidence that he used any unusual force. Did she say no at this point? Any screaming? No. He went out and the Saint Elizabeths Hospital guard testified that you have got to drive by a guard. Any attempt on her part to get that person's attention? Huh-uh. He went down to this gas station. She keeps talking about Mr. Johnson having his arm around her. Well, I have heard the testimony to be that

he had a Ford Falcon, a very small car, that has a standard transmission. You answer for yourself or maybe Mr. Nunzio can answer for you, how can he keep his arm around her? After all, that's how he's gotten her under his will. How can he keep his arm around her and drive his car and shift all the gears he did? After all, he would have to put it in at least a couple of gears in leaving the gas station. He would have to put it in at least a couple of gears to start up. She talked about going up and down hill. He would have to probably shift to different gears. You tell me how she was constantly in fear of him.

And, ladies and gentlemen of the jury, if you find that at one time she was in fear, but she was not in fear at the time or just prior to when the act was committed, then you have to find him not guilty, because then it isn't rape.

In other words, she had to be in fear right the moment prior to the act actually having been committed. If she wasn't in fear, if that fear was wiped away—and I don't know how you can interpret a person taking off their clothes—I say if that isn't consent, I've never heard it. That is, if it was committed. I am only arguing because this is the testimony. We don't concede that this ever happened.

Ladies and gentlemen of the jury, is there anything in this case that is away from some of this testimony? Something standing alone, something tangible that we can lay our hands on?

Well, let's look at those FBI reports.

Now, Mr. Nunzio tells you that the sweater—do you recall that Mr. Johnson stated he never left his car, and Mrs. Mayes was never in his car. (Indicating the exhibits.) Is there any way of proving that she was never in his car? I think there is.

Now, if you will recall, the FBI agent testified that there were traces on certain items of clothing of Mrs. Mayes from this sweater, this sweater, on certain items of clothing. And it is my recollection that the testimony was that they were on these three items, this jacket, this blouse, and this bra or brassiere, whichever you want.

Now, I guess I ought to answer that for you, really, to

wipe anything away out of your minds. That is pretty damaging, no question at all about it, because, after all, the inference is that he touched her. Or was he close enough to touch her, and if she was never out of his car—if she was never in his car—how did that happen? I don't know, ladies and gentlemen, how that happened.

But I tell you I could answer that question for you, if the Government would answer something for me, and the question I would like them to answer for me is this:

Now, if you will recall, on cross-examination, I asked Mrs. Mayes how these things were worn. And I believe she said that this was the garment which would be closest to her body (indicating the exhibit). And then she testified that this slip went over this. Then, of course, when you put it on there, you can see, up in the area in which this bra is, it is kind of double, there is a lace effect, and underneath the lace, there is a solid piece. That part would fit over that bra, like this (indicating the exhibits).

And then, on top of that goes this blouse, which she testified buttons in the back. And, of course, you can see it goes right around her neck.

And then, of course, on top of that, we have got this thing.

Now, there would be no problem, that's easy, that sweater against that. That's kind of easy, huh? That is kind of easy, because this jacket opened up. No problem on that.

But, ladies and gentlemen of the jury, you have the Government answer to you how there was no evidence that this sweater came in contact with that slip, and, yet, this sweater came in contact with that brassiere which was underneath. Now, when the Government answers that question for you, then I can answer the question of the sweater, how this came in contact with these three pieces that the FBI says came in contact with one another. It seems they would have to weasel through that thing right there to get to that bra.

Now, I can suspect—you know they brought this testimony to you about how careful they were to make sure that these things didn't come in contact with one another before they got to the FBI. They were real careful. In fact, Officer Perry, he thought those gloves were real important and the keys were real important, and he kept those in his possession. But what about that little piece

of paper? Wasn't that just as important? Wasn't that just as important? That could prove to you that he gave her a different name, which he says he did not. Could prove that to you. On that little piece of paper was his phone number. They lost it. That little piece of paper with the phone number, they were so negligent they lost that, and if they were so negligent that they lost that, why couldn't it have happened that the clothes would come in contact together before they ever went to the FBI? Why couldn't that have happened?

They are trying to impress upon you how careful they are, that Officer Perry tells you that this fellow's clothes were in a shopping bag open when he went home at night, it was a shopping bag left in his place all the time.

Well, if his were left open, why couldn't hers have been left open?

The Officer McNeal, or something like that, he said that he had put these — he had put them in a secluded place. He said he only worked until 2:00 o'clock that day. Johnson was arrested after that.

Yet, Johnson tells you, and there's nothing to dispute him, that he saw these clothes or something that looked like these clothes down in the police precinct when he got in there about 4:30.

Now, I think that probably what happened, these clothes were laying around like they have been laying around here the last couple of days, and that is the way they got together, and somebody missed the boat, and luckily for Johnson's part, that they didn't get together with this slip.

Now, when the Government can tell you how none of this sweater got on this slip and, yet, on that bra, like I say, I can answer how they got on the rest of the clothing.

What evidence do we have that Mrs. Mayes was never in his car? We've got the FBI evidence. It is my recollection there were no fingerprints in his car, no fingerprints in his car, and they tested for that. It is my recollection that there is nothing on any of his clothing from hers. It is my recollection that the officer from the FBI testified that they tested his front seats. They found nothing on the front seats that they could attribute to her or to anybody in this case. Yet, they found things on the front seat, but they could find nothing that they could attribute to this case.

Now, also, they found nothing on these trousers. Now, these are the kind of trousers that when I was a young man we used to say, picked up everything but women. You can see that laying around here they picked up a lot of things, but there is nothing on these trousers, and these are the trousers he wore that day, nothing on these trousers to say they ever came in contact with any of Mrs. Mayes' clothing. And you know if he did what Mrs. Mayes said he did, they had to come in contact with her. Yet, nothing on these trousers.

One more thing: Mrs. Mayes says that after he got done with the act, he says, "Oh, you've got my trousers dirty." You take a look at the trousers. You go take them with you to the jury room. See if you can find any dirt on them. The FBI examined them. They didn't find any woman's sperm on here. Huh uh. They didn't find any. They didn't find any woman's hair on here.

How about these shorts of his? What did the FBI say? They said they've got male sperm, they didn't say any woman's sperm on here, male. What's the matter with that? A man wore them, and what's the matter with sperm being on shorts? And that's why shirts I suppose were invented, you may have an accident sometime, and they will go on there.

And they found male sperm on her panties. Well, I don't dispute that. That could have been her husband's. Mr. Nunzio said, "You recall I specifically asked her if she had washed." Well, I don't know whether she did or not. And then, again, why is it that she couldn't have worn these panties at another time and just put them on this day? But there is nothing to say that Mr. Johnson's sperm was on those clothes, just that they are male sperm, and I don't dispute that there is a possibility that they are her husband's, because she has testified she had had intercourse with her husband a short time before.

The testimony of Dr. Petry of Saint Elizabeths Hospital was that it could be any man's, and it could be any man's for 24 hours before he was examined, or before the slide was taken.

Dr. Chin, I think she kind of said something that was rather important, no bruises. What does no bruises indi-

cate? That there was no force, if you believe her, that this ever took place.

Now, about that telephone. Of course, there's no question at all, who had that telephone all the time.

So they want you to believe that he would give her the wrong first name and the right telephone number.

One more thing on this: They want you to believe how he was such a sinister person. You recall, when I asked all the officers, and when they came to him he was waiting in the car, they said he was laying down. They want you to get the idea that this guy was there waiting, and if he saw anybody was there he maybe would run away. And when I really put it to them, was he laying down, well, his feet were on the floor, and his head was only slouched over a little bit, it wasn't on the seat.

Well, Mr. Johnson tells you he didn't even want to go to her car, even though he had the keys he didn't want to go to her car until she was present. One more thing, is there any dispute that he came back with battery cables?

The Government has in its possession that automobile. You saw, as well as I, Mr. Nunzio going over to one person to go out and get some sort of evidence during the course of the trial. Nobody ran down to see if there was still battery cables in that car.

Ladies and gentlemen of the jury, I am only giving you some of the things that bother me in this case. And, as I pointed out to you, it's not up to Mr. Johnson to prove to you his innocence. It is up to the Government to prove to you that he's guilty beyond a reasonable doubt.

And as I've argued to you, I don't believe any crime was committed. Even if you believe the Government's testimony at its very best, at its very best, I don't believe a crime was committed. Because if you have the crime of rape, there has to be force and without consent. And she has to have resisted some.

Above all, might I ask you, not once did she say no, is that too much of asking a woman that is going to be raped to say even once, no, "I don't want to do it"? Did she show you anything at all in which she resisted, and she tells you, no, she didn't. And the only reason she didn't is because

she was in fear. And then in fear of what? There isn't anything at all.

Mr. Johnson told you his story truthfully. There were a number of things that he honestly confessed to you. He didn't know. I think one of them, and I think I might as well mention it, the gloves being in his car. We don't know how the gloves got in his car, and he told you so, "I don't know." I have no reasonable explanation for it.

The only thing that bothered me about this case was the fact that his hairs were on those clothes. As I say, I will answer that question when the Government tells me how in the world those hairs can get on one garment covered by another, and not off the covering garment. If I had the answer to those, I would be able to answer that question to you, also.

Every bit of tangible evidence, when I say "tangible evidence," I'm talking about something physical that doesn't depend on somebody's testimony, and that's the FBI report, the FBI reports. Every bit of that testimony backs him up that she was never in his car. There isn't one single, solitary piece of evidence that ever showed that she was in his car, except those gloves. I don't know how they got in there. He offered an explanation maybe of this, Mr. Nunzio makes a big point that he had the keys. He doesn't dispute he had the keys. They were given to him by her.

As pointed out, it's not his duty to prove his innocence. It's the Government's duty to prove him guilty, first, and I don't think they have proven him guilty. I don't believe they have actually proven a crime beyond a reasonable doubt. I don't think they have proven a crime. But in addition to that considering his testimony that he was never—she was never in his car—one point I want to make: There was a lot of talk about his activities the night before and how much he had to drink.

Why is that important? I think it's important for one reason: If you recall, I asked Mrs. Mayes if there was anything peculiar about him. She said no. I also asked her whether or not he was intoxicated, and I believe she also said no to that. Now, Mr. Aldrich said he thought he was drinking. I forget now, the gentleman from Orleans Place,

he told you how much they had to drink. Mr. Johnson told you how much he had to drink.

Mr. Johnson's wife, and you can call her whatever you want, but I'm going to call her his wife, she testified what he had to drink.

Now, drunkenness is a degree. I mean, somebody once told me that down in Tennessee they don't call a man drunk until he's flat on his back. That is a degree. But I say to you this: In order to have an act of intercourse, two people get close together, pretty close, and I say with the amount of drinking that he had, that he would have on his breath an unforgettable strong odor of alcohol. Yet, Mrs. Mayes never mentioned it once. If he had that much to drink and that close, as close as he would have to get to her, it would be an unforgettable strong odor of alcohol.

Mr. Aldrich said that he was not drunk, yet he knew he had been drinking. Why? I would guess probably because he smelled it about him. This was on the outside, not in the confinement of an automobile, a small automobile.

I don't know what more the defendant could have brought here, and what other testimony he could have given you to prove his innocence. But I think he's done everything that he possibly could. And I believe you must find him not guilty, because he is not guilty, and for no other reason.

Thank you.

THE COURT: Mr. Nunzio.

MR. NUNZIO: Ladies and gentlemen, Mr. Ianni says he is at a disadvantage because I speak last. Actually, I can't go beyond any point that he's commented on, so that I must confine myself strictly to his remarks.

Mr. Ianni has done a wonderful job of defending a phantom who, according to his testimony, never committed a crime because there was none committed; because he takes a sword, and he swings it at you both ways. He is saying to the jury that if it happened, there was consent. That is the first swing. But as he takes the sword and swings back the other way, he says this man didn't do it; he wasn't there. He's using a shotgun there, it's like standing back of a shotgun, the further you get back the wider the pattern grows.

He's hoping that something sticks, perhaps, in one line

that will acquit him, a shotgun pattern, a pattern. Blow up everything, confuse, and that's what he's done.

How can you argue finally when a man says there was no crime, if there was a crime, there was consent, and, lastly, "my man didn't do it."?

I would say label this case, not "the case of a dollar's worth of gas," but as it says in the indictment, the case of The United States of America versus Barrington Joseph Johnson.

I submit that the Government has proven it on the evidence, not what I believe, but on the evidence, nor what Mr. Ianni believes. The evidence supports this woman being in fear of this man.

Mr. Ianni said at one point, they won't give the defendant credit for being smart. I give him more credit than Mr. Ianni does.

Was he telling the truth concerning the incident at the gas station? He says he was drunk. Of all the witnesses who say he was drunk, those same witnesses, especially the one who had the car—they walked to the place three-quarters of a block, but then they drove around the block, and he was so drunk he said, "Can you get home?"

He was seen by that gas station attendant that corroborated he was near a phone booth when she was talking to her husband.

One dollar's worth of gas. I don't know where Mr. Ianni bought gas, but if he thinks he can go around the Beltway on a dollar's worth of gas, he's mistaken, he's highly mistaken. He's highly mistaken. He needed more gas. He bought a dollar's worth to get home on and to work, but when he had the woman in the car he needed another dollar's worth of gas. And gas at 35 cents a gallon, he needed more gas, because they drove around, he couldn't have driven around with a dollar's worth of gas. Give him credit. I give him credit, as for shifting the car—perhaps our children, perhaps our children could educate us on how to hold a girl friend around the neck and shift the car. Maybe Mr. Ianni doesn't have children, perhaps some of you don't, but believe me, ladies and gentlemen, it can be done. You see teenagers, from your own experience, at some point reach across and shift with one hand.

Now, there's no evidence as to how far from the window he was leaning. The only evidence is he had her around the neck. I submit you can do it with the other hand. I submit he did it because he's smarter than Mr. Ianni gives him credit for.

As to the light in the parking lot: Give him credit, he wasn't going to roll up there pushing somebody for fear the person getting out of the car would stop. He waited until it was clear.

Only if you believe his testimony, he dropped her off at 7:00 o'clock, could you conclude other people were coming to work. This was earlier, this was earlier. Why he was smarter than Mr. Ianni gives him credit for, that's all right, give him credit for being smart, give him credit for being smart based upon this evidence, not upon what I believe; but this evidence that Mrs. Mayes would tell him anything, do you believe it? Do you believe by any stretch of the imagination did she walk in and say, "I want annual leave?"

Take the testimony completely of Mrs. Fushee. This was a woman with three kids, working since '59 there, and he says probation—probation! There was nothing to show she was fired or discharged. She was trying a job out. What sort of a seed is he putting in your mind using the word "probation"? A shotgun—that's all. Put some seed in somebody's mind, and maybe they'll acquit him.

She reported it immediately.

How can you argue against Mr. Ianni, because he says there was no crime, but if there was one she consented, if there was one his man didn't do it? A shotgun!

He says that there is nothing to dispute about what Mr. Johnson said about his clothes.

I don't know, but I think I recall from my biology, even in high school, that there is no discharge from a woman as far as semen or spermatozoa. The woman has an egg that is fertilized by the spermatozoa, and the discharged material is carried by the man.

And what a feeble excuse—what a feeble statement, that he has the courage to stand before you and say they are worn because of accidents, and because of an accident the spermatozoa are on his shorts.

She testified that she cleaned up after having relations with her husband at 10:00 o'clock. The next morning she put on clean undergarments, and he stands before you and says, how do you know she cleaned up.

Ladies and gentlemen, she said from 10:00 o'clock that night until six the next morning before she finally got dressed and put on clean garments. That's her testimony.

The FBI testified about these points, and I don't know, the way Mr. Ianni said they collected everything, said everything would stick to the surface. As a matter of fact, I had a fond love of knickers when I went to school. I know this, though, mom could wash them. Mom could wash them with water. They wore like iron, and they dried.

What did the FBI tell you? If these were the garments —remember, this man was gone at 7:00 o'clock in the morning and picked up at 2:50. If these were the pants, they could have been washed; and if these weren't the pants, then someone lied.

Mrs. Tyndle lied. He said he was going to call her his wife, the man's wife who is divorced,—no reflection on Mrs. Tyndle, but this is an alibi, he was home by seven, this is an alibi.

The woman said he didn't leave that parking lot until 7:30, and she went in and reported immediately.

Was Mrs. Tyndle telling the truth?

Mr. Ianni seems to think that we must prove the case beyond all doubt, there must be semen over everything. You don't prove a case beyond all doubt save by going into the minds of individuals.

But there's enough, I say, more than enough, beyond a reasonable doubt to pinpoint this man, the gloves—he doesn't know how they got in the car—give his client credit for being smart. The windows, the hands on it. What was he trying to show on that stand, "But they could have been dropped without her knowing it," and insulted your intelligence by saying she dropped them. Give him credit for being smart. We do.

Give me your mind for one moment, for one moment:

Visualize this woman on a deserted street, if you believe her testimony, starting to get dawn but nonetheless dark.

We play with those terms, but we all know, as reasonable people, what dawn is. There is a haze, there's a darkness, even a point when your lights won't help you because it's too light and, yet, it's dark, too. Nowhere is there a house or a car. This is an isolated place. And visualize she's in there, and a man she doesn't even know talking to her, "your name, your children," "do you love your husband," "I told you to take off your things," and he reaches over, she says, "I'll do it."

What would a reasonable person have done? And you are reasonable people. What would you have done? She said, "I'll take them off." She was in fear for her life.

Still continue this picture: He pushes her head down by the wheel. Visualize her head going down under the wheel. This is a small car. And he pushes her clothing up.

When he performed the act that was created for marriage between two people in love, not some woman that he grabbed out of the car, was he gentle with her? Did he tenderly caress her and say, "I love you"? This was not a bedroom scene. This was not a bedroom scene, at all.

Mr. Ianni would have you believe it was intimate love at first, but visualize this: She's down there, and he pushes her clothing up. How high does he push them up? He says he wants an answer to where they came from and how they got on there. In graciousness, and I say it to you in graciousness, she said they had sexual intercourse, she didn't go through it blow-by-blow and movement-by-movement. But if this happened, did the man tenderly touch her? How did he touch her? Examine the sweater and see how it slides. He wants to know how it got on some things and not on other things.

Where is the answer? If you believe the complainant, the answer is in the mind of that man sitting right there. That is where the answer is. He asked the Government for the answer, but there sits the answer, if you believe the complainant.

You go through this charade of dressing a chair, I won't treat it lightly, it's a capital case, I can't go through the charade of dressing a chair, but I do know and this is a proven fact: They testified to fibers on her suit, something that grafted onto the material. He was on top of her.

And this is the blouse she wore. (Indicating the exhibits.)

Maybe it got through, maybe the fibers were pushed up while he was manhandling her, having sex with her.

You ladies know, and even you gentlemen, your undergarments will crawl on you, things will crawl up because of body movement.

He wants the Government to show fibers on everything she wore and everything he wore. If you believe the complainant, there sits the answer, there sits the answer. (Indicating)

Can you argue a case against Mr. Ianni. Again he says there was no crime, and if she was raped, it was consent, and if it was consent, regardless, his man didn't do it.

I submit his whole argument to you was a charade.

He didn't tell the police about the keys until they told him what happened. He couldn't get out of that.

As to that telephone number, they had him. The piece of paper was lost, but she did not lose it. The police did. They are not on trial. He is on trial, and she is the accuser.

He said it's easy to charge somebody with rape but hard to defend. It's hard to defend when you've got evidence like this? (Indicating the exhibits.) Hard to defend? You can only assume that if they had checked the number out right what would have happened. He still had the keys. She still accused him. He still had those shorts. Her clothing was still taken.

Only because, and I submit to you, based upon this evidence, only because he was an egomaniac, an egomaniac, were they able to place the defendant, because after his conquest of an unknown in a car, and because she was in fear of her life, in fear of death, in his conceited egomaniac way, he came back. He came back because he heard nothing in the interim. He did not use a knife. He came back as an egomaniac, and that's why he was caught.

What sort of a man except an egomaniac would have done what he did that morning, if he, in fact, did it?

No, this is not the case of a dollar's worth of gas, this is the case of The United States versus Barrington Joseph Johnson, who sits before you accused of rape. And I submit that the Government has proved, through credible testimony, that he is guilty.

He said that I'm trying to make him a sinister person. I didn't make him so, by his own actions he made himself sinister.

He says why didn't she say one no? What does Mr. Ianni care about one no? He said there was no crime, that she lied. What does he care about a no? Let's make believe—who cares? And he says it wasn't his name. Who cares what happened in that car?

But to play it safe, he plays all sides. There is no crime, if there was she consented, if there was a crime and she did not consent, this man didn't do it because he wasn't there.

One no! How brave of him! How brave! Would she have been here today if she had said no?

He says he's no hero, and let him not be the hero for someone else subsequent to the event.

What would a reasonable person do or reasonable persons have done under the circumstances? What would a reasonable person have done? He wasn't scared.

But the law provides that such consent must be induced by physical force and threats, put a person in reasonable fear, reasonable fear of life and great bodily harm.

There were no bruises, that the doctor testified to. People freeze in fear of life, some people freeze. Would you have this woman on the lonely road, as the jurors who try this case, would you want her—is he trying to say that he wants you to say that she could have screamed, she should have scratched him? What does Mr. Ianni want from a woman taken to a deserted area to be raped?

I submit that she acted, I think she acted out of fear, not only fear, but fear of great bodily harm, and she testified to that. This is a quiet woman, mother of children, who goes home to her children, and now he's saying she should have struggled, just one no. How magnanimous of Mr. Ianni! How magnanimous of him!

You have heard the facts. Of course, the answer to the fibers sits over there, in this mind. If you believe her if you believe the complainant, that's where the answer is, because to believe otherwise you would say that this woman conjured up this whole thing, this was all prevaricated evidence before you, just a sham.

Her testimony was credible. It was lamentable that this, in fact, did happen, if you believe it.

I submit she's believable. I submit that she went through this ignominious ordeal on that morning. That she reported it immediately, and the evidence supports sex, supports rape.

I ask you to close the case, not the case of a dollar's worth of gas, but the case of The United States versus Barrington Joseph Johnson, by returning a just and true verdict of guilty as charged.

THE COURT: Ladies and gentlemen, at this point we will take the luncheon recess. Since we have run overtime, we will reconvene at 2:00 o'clock. At that time I will charge you as to the law, which you will apply to the facts.

Don't talk about the case during the lunch hour. You will have plenty of opportunity this afternoon.

(Whereupon, at 12:41 p.m., the Court recessed.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 335-67

UNITED STATES OF AMERICA

v.

BARRINGTON JOSEPH JOHNSON,

*Defendant.*

Washington, D.C.

January 22, 1968

The above-entitled cause came on for further trial before the HONORABLE HOWARD F. CORCORAN, *United States District Judge*, and a jury, at 10:22 a.m.

Appearances:

For the Government:
NICHOLAS NUNZIO, Esq.

For the Defendant:
SAMUEL F. IANNI, Esq.

PROCEEDINGS

MR. NUNZIO: Thank you very much for your consideration, Your Honor. I had to be before Judge Walsh.

THE COURT: I understand.

Thereupon

BARRINGTON JOSEPH JOHNSON

resumed the witness stand and further testified as follows:

CROSS-EXAMINATION (resumed)

BY MR. NUNZIO:

Q. Mr. Johnson, you were telling us last Friday as to what happened when the police came.

Now, did you, in fact, leave the car before the police arrested you?

A Do you mean had I gotten out of the car?

Q That afternoon?

A Had I GOTTEN out of the car?

Q Yes.

A I had talked to the gentlemen washing the car next to mine.

Q Did you get out of the car?

A I got out and stood out and talked. Then I got back in.

Q Where was this other gentleman at the time you left your car and went over to talk to him?

A He was right there at the next car (Indicating).

Q Then there came a time that you went back to the car?

A Oh, yes. I sit back down and talked to him through the window. I was sick, and he washed under my car.

Q He washed your car?

A He washed under my car. He didn't wash my car.

Q What do you mean by he washed under your car?

A He just threw some water under it.

Q What section of the car was dirty that he was washing?

A It was not the car; under the car, right under the righthand door where I was sitting.

Q Are you saying you threw up on this spot?

A Right down beside my car I did.

Q When did you throw up? Before you got out of the car and talked to this gentleman?

A Well, after I got back in.

Q You are saying that you were parked there, you went back, that you had the battery cables in the back of the car, in the trunk?

A Yes, I told—like I told you.

Q There came a time that you saw an individual, so you stepped out of the car to talk to this individual?

A Well, I seen him when I pulled up.

Q Did you pull up right next to him?

A He was washing the car right beside where I parked.

Q How close were you to his car when he pulled up?

A Well, they have lines there you park between.

Q Was he in the next line area?

A He was right beside. (Indicating.)

Q He was washing the car, I take it, with a bucket, or was there a hose?

A He had a bucket.

Q One bucket or two buckets?

A I'm not sure.

Q And how long did you observe this man washing the car before you stepped out of your car?

A I couldn't tell you. He spoke to me as I drove up.

Q Now, you stepped out of your car then, is that correct?

A Yes.

Q Where did you stand? Right next to your car?

A Yes.

Q Then there came a time that you stepped back into your car?

A Yes.

Q Well, when did you upchuck or throw up?

A After I had gotten back into the car.

Q Just how—did you get out of the car to throw up?

A No, I stated I didn't, sir. I opened the door and spit up right beside the car.

Q What did the man say, and what did you say?

A I didn't say anything. I said—

Q Keep your voice up. I can't hear you for the fans.

A I told him I had a hang-over.

Q And he just took the water and threw it on the ground?

A NOT RIGHT AWAY.

Q Not right away?

A No, sir; not right away.

Q In fact, did he see you throw up earlier?

A Yes, he seen it.

Q Did he continue to wash the car?

A Yes. And then he came around and threw the water under there, not much, just a little.

Q Did he say anything to you when he did this?

A He said something like, "Get it away," or something, you know, in a manner he wanted to help.

Q Did the police come shortly after that and arrest you?

A Yes.

Q The man continued to stay there washing the car at the time the police came?

A Yes, I think he was finishing up then.

Q Did he throw all the water in the bucket on the upchuck material?

A Just a little.

Q Incidentally, before you went out Saturday night after work,—you were working for the fuel company—did you come home, shower and shave?

A Thursday night?

Q Saturday night, after you finished work, did you come home, shower and shave?

A I don't know whether I shaved or not, but I showered.

Q You showered?

A But I showered.

Q This was Saturday before you went over to Kaiser's?

A Saturday evening, yes.

Q Do you have a shower or bathtub at home?

A I have both.

Q Do you recall what you did, bathe or shower?

A Showered.

Q You showered?

A Yes.

Q All right. Did you shower Friday, that is the 20th of January?

A Yes.

Q I take it then it is your practice to shower daily after you finish work, is that correct?

(The witness nodded.)

Q I take it then that you put on clean clothes prior to going on over to Kaiser's is that correct?

A I think most of them were brand new.

Q Everything?

A Not everything. The pants and the sweater were brand new, and the shoes, too.

Q But the underwear was not brand new stuff?

A No, sir.

Q After you showered on that Saturday, then you put on underclothes and brand new clothes?

A I think I changed my underclothes. I changed my underclothes every other day. I think—

Q Did you change them that day?

A I'm not sure. I don't think so.

Q Did you change them Friday?

A Most likely I did.

Q You don't know, though?

A I'm not sure.

Q So you don't know whether you changed your underclothes on Saturday?

A I don't think I changed them Saturday. I'm pretty sure I didn't.

Q How are you pretty sure you didn't?

A Because I have a schedule or something that I shave by and change by.

Q And you did not shave Saturday?

A I did not. I'm sure I didn't, because I usually shave on Sundays.

Q So you did not shave on Saturday then, and when you don't shave, you don't change your underwear, is that what you're telling us?

A I'm not telling you that. I'm telling you I usually change my underclothes on Sundays.

Q On Sundays?

A That's right. That would be the beginning of the week.

Q Did you, in fact, change on Friday then?

A I could have.

Q So you don't know then?

A I know I didn't change them Saturday.

Q But you don't even know if you changed them Friday?

A I'm not sure.

Q Did you have relations with Mrs. Tyndle on the evening of Friday and Saturday?

A Friday and Saturday?

Q Friday night and Saturday morning?

A Saturday morning? It's possible.

Q You don't know?

A No, I don't know offhand.

Q Well, let's just ask you this: Did you have relations during the week, on the 19th or 20th?

A Yes. Yes. During the week, yes.

Q But you don't recall when?

A No, I don't. Can't recall.

Q Nor can you recall on Friday morning or Saturday morning before you left for work, on Saturday, the 21st?

A It's possible. I don't know.

Q I take it that you did not wear your underclothes to bed when you were having relations with her, is that correct?

A You take it I did what?

Q You did not wear your underclothes to bed when you were having relations with this woman that you were living with?

A Oh, no.

Q Do you recall at all which day it was during the course of that week before you were charged with this offense that you had relations with Miss Tyndle?

A No, I don't recall those days.

Q You don't recall?

A No.

Q Nor can you recall whether you had relations with her Friday night to Saturday morning, that is prior to the time of this arrest?

A I could have. I don't know.

Q It is your testimony, to the best of your recollection, you changed your underwear that Friday before the arrest?

A I don't know whether I did or not.

Q Now, you testified that you had no intention of com-

ing back to allegedly start this woman's car at the time that you left that morning, is that correct?

A I wouldn't have came back if she hadn't put those keys in the car.

Q Are you saying you came back because you had the keys?

A That's the only reason, I did want to return her keys.

Q You were there approximately a half hour before the time you were arrested, is that correct?

A Approximately.

Q Had you an intention of starting her car when she came out?

A Only if she had asked me to.

Q Only if she had asked you to?

A Yes.

Q Otherwise what were you intending to do with the keys, merely giving them back to her?

A That's correct.

Q Now, you had a key, both of her keys, one to open the car as well as the starting key, is that correct?

A I don't know what the keys were. They may not even have fit the car. I just know she gave them to me. I didn't try them, or anything like that.

Q Did you have a good look at the woman at the time that she was talking to you so that you could be able to identify her if and when she came back to the car?

A I don't think I could have. I looked at her, but maybe I could have, maybe I couldn't, I don't know.

Q In other words, you are telling us you didn't know even who you were looking for, is that correct?

A Only if she came to the car and asked me for the keys.

Q When you woke up that morning, that Sunday morning, did you still have the keys in your hand?

A I'm pretty sure I did.

Q At no time did you ever put the keys in your pocket?

A Yes.

Q From the time she threw them until you came back?

A Yes.

Q When you—

A When I got up.

Q When you got up?

A Yes.

Q In other words, from 7 o'clock, allegedly when she threw the keys to you, until—was it 9:30?

A No, it was not.

Q What time was it when you got up?

A A little after 10:00.

Q A little after 10:00. Miss Tyndle was still at home?

A I'm pretty sure she was.

Q Now, you didn't shower or shave that Sunday morning now, did you?

A No, I did not.

Q But normally that was your practice, to shave and shower?

A That would have been, but I was late for work.

Q But normally you would have shaved and showered before you went to work that day?

A I would have, or either when I came back home, because I came in earlier.

Q But you testified—you said that you were a little late, you were due there at 10:00 o'clock, and you placed a call and the boss said no calls had come in, is that correct?

A I placed a call, and he said there had been no calls, and I told him I would be right up.

Q What exactly did the police say to you and what did you say to the police at the time of this arrest?

A What do you mean? I don't understand.

Q You testified that the police came up and said something to you, isn't that correct, at the time that you were still at the car? This is on the afternoon of January the 22nd, 1967, while you were parked on the lot.

A You mean when they first arrived?

Q When they first arrived, yes?

A Well, Officer Wesley got out of the car and walked over to my car, and he asked me for identification and what I was doing, and I told him. And I told him that I was

waiting to start a lady's car, and he said, "What lady's car?" And I said the car over there.

Q You told us you had no intention of starting this car unless she asked you to?

A That's right. That's right.

Q You said you were waiting to start a lady's car. What else was said?

A He told me that—he asked me what lady's car, and I said that one, and he said that that lady had been raped that morning. And I told—

Q Go ahead. What did you say to this officer?

A And I told him I didn't know anything about that. I told him I was going to fix the car.

Q You were the one—

A I told him I was the one that pushed the car, but I didn't know anything about any rape.

Q There was conversation about the keys, too, wasn't there?

A Well, he asked me did I have them. I told him yes, I had them.

He said, "How did you get them?" I told him she gave them to me to start the car.

Q In other words, you had this woman's keys in your possession, and they told you the person that owned the other car had been raped, and then they asked you about the keys, and you did not say anything about the keys up until that time, is that correct?

A Oh, I told him I had the keys.

Q After they had asked you, is that correct?

A Well, yes.

Q What time would you say it was that you had left the grounds at Saint Elizabeths Hospital after pushing this woman?

A I would say about, around 6:45, I would say.

Q Do you recall her testimony that she went inside approximately 7:30 on the morning of January the 22nd? Do you recall her testimony?

A Yes, I heard her.

Q Were you on those grounds anywhere after 7:15,

between 7:15 and 7:30, on the morning of January the 22nd?

A I wasn't on the grounds at 7:00 o'clock.

Q You weren't even on the grounds at 7:00 o'clock?

A No, I was home then.

Q You were present at the time this woman identified you as the man who had raped her this afternoon?

A No, sir, I was not. She identified me as the man that had pushed the car.

Q What exactly did she say in your presence?

A The officer asked her, "Is this the man that pushed your car?" And she said yes, and that was all.

And I told one of the officers that she didn't say I raped her. I said, "She said I pushed her car," and in some kind of way he had told me that had said this earlier. I said, "Well, you see the battery cables in the trunk." And nobody knows what happened to them then. Yet they seen my coat, but nobody knows what's happening to the battery cables; and to see the coat, you would have to get the battery cables.

Q Did he tell you what time she was working when she allegedly threw the keys to you?

A They said 3:00 o'clock, or something like that.

Q They said 3:00 o'clock, or something like that?

A Yes, they said three—something with three to it, three or a little after, or something.

Q You saw fit to be there at 2:30 that afternoon?

A I was there around that time, I would say, yes. Well, I was on my way, and just stopped and made the lady come out. All I wanted to do at the time was give her the keys and go home and go to bed.

Q You were tired?

A I was run down.

Q You never put the keys in the car?

A I didn't want to touch the lady's car. I had no business near her car. I told her I was not going to touch her car when she put the keys in there.

Q But you did take the added precaution, according to your testimony, of getting some jumper cables, is that correct?

A Well, after the lady put the keys in the car, I did.

Q Did you go back to Saint Elizabeths to start the car and return the keys?

A I went to return the keys. If she had asked me to start the car, I would have tried, anyway.

Q But you never knew this person's name, is that correct?

A That's correct.

Q Just trying to be a Good Samaritan?

A I guess maybe that's what you would call it.

MR. NUNZIO: I don't believe there are any other questions, Your Honor.

THE COURT: Any redirect examination?

MR. IANNI: There is still a question about this, Your Honor, but I am not sure exactly what the status was.

THE COURT: Do you have any comments on this, Mr. Nunzio?

MR. NUNZIO: May we approach the bench, Your Honor?

THE COURT: Yes.

(AT THE BENCH:)

MR. IANNI: It might not be worth much.

(Perusing a document.) It shows his phone number.

THE COURT: It is not the same time, or anything else. Do you have any comments? Do you care whether this gets in?

MR. NUNZIO: No, Your Honor. If it does come in, I will have to recall two of the officers.

The number on the piece of paper, I found out, was the number—they called that number that morning, got no response. They cross-indexed the number, and came up with the name of Anderson. They went to Anderson's home somewhere else, and the complainant was taken with them, and the identification did not match.

They came back, and at the time the defendant was arrested, the paper was turned over to the ID bureau. And that's where the paper was lost.

I will state for the record that this is the number that was given, except the name "Charles" was on it.

In other words, the police called, got no response, cross-indexed it, got the wrong address from the telephone company.

By the time they would have pursued it any further, he was arrested.

MR. IANNI: I would like to have those police officers back.

MR. NUNZIO: They will be back. I can explain it away.

MR. IANNI: This is vitally important, Your Honor.

THE COURT: Well, I think it has been connected up. He gave this number. Mrs. Tyndle gave him the number. It never changed.

MR. NUNZIO: Actually I challenge one part. She testified she had this number for three years. She didn't get it until November '66.

THE COURT: That would cover the period.

MR. NUNZIO: That would cover the period. That's right.

THE COURT: I will permit it, subject to connection.

MR. NUNZIO: To simplify anything on redirect, well, to show that there is nothing on the complainant's part, if there was a mixup, it certainly was inadvertence with respect to a police officer handling something that was subsequently lost. If I could have this after Mr. Ianni finishes, we wouldn't take much of the Court's time. Detective Perry is familiar with everything, even with some heresay involved, so that we could give the jury some explanation on that on rebuttal.

MR. IANNI: Okay.

THE COURT: You don't have to go into it—

MR. NUNZIO: To show, Your Honor, that there was veracity on the part of this girl, that she did turn it over. The police checked the number, and got no response.

THE COURT: What difference does it make? All we want to establish is that this boy gave her the right number, isn't it?

MR. NUNZIO: It may go somewhat to his credibility, but I think the government is entitled to complete the loop. Because he stayed home through this period, was never picked up by the police, and then shows up that afternoon.

If there was a need to pick him up after immediately reporting the matter, the testimony would clarify why he wasn't picked up immediately, and that is the only purpose, Your Honor.

THE COURT: All right. That is part of your rebuttal case.

MR. NUNZIO: That is the only reason.

MR. IANNI: So I have nothing further to get in evidence?

THE COURT: No, it is in.

MR. IANNI: We can show it to the jury.

THE COURT: It has been admitted, and you have already shown it to the jury. You can pass it around later.

(END OF THE BENCH CONFERENCE.)

MR. IANNI: I would have no further questions, Your Honor.

(The witness stepped down.)

MR. IANNI: That is the defendant's case, Your Honor.

THE COURT: Do you have any rebuttal, Mr. Nunzio?

MR. NUNZIO: Yes, Your Honor. I would like to call Detective Perry to the stand.

Thereupon

ROY PERRY

called as a rebuttal witness by the government, having been previously sworn, resumed the witness stand and further testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Detective Perry, you are reminded that you are still under oath.

Detective Perry, did there come into your possession on the 22nd of January, 1967, a piece of paper that you received from the complainant, Miss Mayes?

A Yes, there did.

Q What exactly was written on this piece of paper?

A A phone number, a name "Charles."

Q Was the name printed, sir, or written, if you know?

A Printed, as I recall.

Q Would you tell us the number, sir, that was on that piece of paper?

A Yes, sir. (Consulting documents.) Number 561 6239.

Q Now, I'm going to show you an exhibit, No. 1 for the defense.

Would you check the telephone number on that exhibit, sir, and are they the same?

A Yes, sir.

Q The numbers are the same, is that correct?

A Yes, sir.

Q And who is the phone listed to on Defendant's Exhibit No. 1?

A B. J. Johnson, 748 Brandywine Street.

Q When you received this information from the complainant, Miss Mayes, what, if anything, did you do with respect to that telephone number, sir, that you had in your possession?

A I made note of the phone number and requested a listing from the chief police operator as to the listing on this telephone. Sergeant DeMilt was then given the envelope to be taken to the ID Bureau.

Q Now, with respect to that telephone number, sir, what information was received from the chief telephone operator, sir?

A The information received from the operator was that the phone was listed to Dale Edward Anderson at 4642 Livingston Road, Southeast.

Q Now, with respect to this information, did anyone go to that address?

A Yes, we did, with the complainant.

Q Was the complainant taken with you?

A Yes.

Q What time was this?

A I don't recall exactly what time. It was sometime during the morning, the same morning she was in the office.

Q Was there a confrontation at that time, sir?

A Yes, sir.

Q To your knowledge, what type of vehicle did Mr. Anderson have?

A A 1964 or '64 Triumph.

Q Was that number that you had in your possession ever checked after that, sir?

A No, sir. Not until just recently.

Q Was it checked before the arrest of the defendant in this case?

A No, sir.

Q Was the cross-index run on the Anderson there, sir?

A Yes, sir.

Q And the cross-index that you ran, sir, what number did it indicate that Mr. Anderson had?

A The 4642 Livingston Road, listed at the same phone number.

Q Could you tell us, sir, what was the date of the cross-index book you were using?

A It was corrected to March 20, 1965.

Q After the defendant was arrested, was any check ever made of that phone number that you had in your possession?

A No, sir.

Q Where was that piece of paper turned in, once again, sir?

A To the ID Bureau, Officer Dion.

Q To your knowledge, is that piece of paper available, or is it lost?

A I understand it's been misplaced.

Q Had you talked to the complainant in this case concerning that piece of paper?

A Yes, sir.

Q Did she tell you she had written that number?

A No, sir.

Q Whom did she say had written that number?

A The defendant Barrington Johnson.

Q At the time that the defendant was brought down to the Sex Squad on the afternoon of January 22, 1967, were

Mrs. Mayes' clothes in a bag that had not been tied at that time and were placed on a table open?

A No, sir. They had already been wrapped. Sergeant DeMilt had them packaged and wrapped and on his desk at the other end of the office.

Q Was the defendant anywhere near that table of wrapped clothing of Mrs. Mayes?

A No, sir. We have several women working in our office. For that reason I took the defendant into the back room and closed the door and took his shorts and pubic hair combings, and so forth, and closed the door so that there would be no embarrassment for anyone.

Back there the clothes were wrapped, in a separate room. No chance for any fibers, hairs or anything to be interchanged through contact with her clothes.

Q Was he at Sergeant DeMilt's desk where this clothing was packed and wrapped?

A No, sir.

Q With respect to the defendant's clothing, was it, in fact, packaged in the back, or somewhere else?

A I placed it in a shopping bag in the back room, and I folded the shopping bag over.

The next morning I wrapped it there on my desk, and it was taken, along with her property, to the FBI, in separate sealed containers.

Q Is your desk located anywhere near Detective Sergeant DeMilt's desk?

A The other end of the room.

MR. NUNZIO: No further questions, Your Honor.

## CROSS-EXAMINATION

BY MR. IANNI:

Q Detective Perry, do you know for a fact—do you know—that Mr. Johnson's phone number, on January 22, 1967, was 561-6239?

A On what date?

Q On the date of this occurrence, January the 22nd, 1967?

A No, sir.

Q You don't know that?

A No, sir.

Q What I am saying, isn't it a fact you know now that the telephone company misled you, and Mr. Anderson did not have this number on that date?

A Mr. Anderson did not have that phone number on that date. Correct.

Q All right. And you testified this is what the telephone company had told you, isn't that correct?

A That's right, sir.

Q Well, do you know for a fact that Mr. Johnson had that number on that date?

A I've just checked it recently, and he did have that phone number on that date.

Q That's right.

MR. NUNZIO: Do you recall when he got that number?

MR. IANNI: I have not finished.

MR. NUNZIO: I'm sorry. I apologize.

BY MR. IANNI:

Q Now, you put Mr. Johnson's clothes in a shopping bag?

A Right, sir.

Q And the shopping bag remained unopened in your office overnight?

A It was not tied.

Q It was not tied. It was an ordinary shopping bag which was open?

A Right.

Q And that is the way it remained in your office overnight?

A Right.

Q And it is your testimony, however, that Mrs. Mayes' clothes by this time had already been sealed, sir?

A Right.

MR. IANNI: Nothing further of the witness, Your Honor.

## REDIRECT-EXAMINATION

BY MR. NUNZIO:

Q From your investigation, sir, did you determine when

the defendant got that telephone number from the telephone company?

A I don't know the exact date, sir.

Q Do you recall what year it was?

A 1964, if I recall. I don't have it. I don't know.

MR. NUNZIO: No further questions, Your Honor.

THE COURT: Thank you, Detective.

(The witness stepped down.)

MR. NUNZIO: Your Honor, I would ask the Court for a short recess so that I can check something else.

THE COURT: Do you have any further witnesses?

MR. NUNZIO: I am looking for someone, sir.

THE COURT: All right.

(Whereupon, at 10:54 a.m., the court recessed.)

*AFTER RECESS*

11:14 a.m.

MR. NUNZIO: The government would call Mr. Aldrich to the stand, Your Honor.

Thereupon

GERALD LEE ALDRICH

called as a rebuttal witness by the government, being first sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. NUNZIO:

Q Mr. Aldrich, I want you to speak slowly and speak into the microphone so that no one will have difficulty understanding you.

Would you state your full name?

A Gerald Lee Aldrich.

Q Gerald Lee?

A Gerald Lee.

Q How old are you, sir?

A Twenty-three.

Q You are employed now?

A Yes, I am.

Q Where are you employed?

A Jerry's.

Q Jerry's Towing Service?

A Yes, sir.

Q You came here from work this morning, is that correct?

A Yes, sir.

Q Mr. Aldrich, where were you working back in January 1967, roughly a year ago?

A I was working at Scott's gas station on Nicholls Avenue.

Q Speak a little slower, please, so that we can understand you. You have a slight speech defect.

Were you working—or what were your duty hours on the 22nd of January, 1967, at the gas station?

A Well, I was working 12:00 midnight to 8:00 in the morning.

Q So did you go to work at midnight the 21st of January?

A Yes, sir.

Q You got off at 8:00 o'clock on the 22nd of January?

A Correct.

Q I want you to think back, Mr. Aldrich, to the morning of the 22nd.

Do you recall anything that happened that morning concerning a car that had stopped?

A Yes, I do.

Q Do you know what time it was, sir?

A It was 4:30 or 5:00, about that time.

Q Could it have been later?

A It could have been. I don't know.

Q Was it dark out?

A It was just beginning to get light.

Q Can you tell us the sequence of events that you had observed that morning?

A Yes, sir. About that time of morning, a lady parked

in front of the station. She had a dead battery. Came over to the station, asked could I get her started.

Q What did you tell the lady?

A And I told her I was by myself, I couldn't leave the station. And there was a gentleman there; he told her that he would be glad to, to get her started.

Q Where was this gentleman, sir?

A Right beside the cigarette machine.

Q Were you selling gas that morning, sir?

A Yes, sir.

Q This gentleman that had volunteered his services, did you sell him any gas?

A Yes, I sold him a dollar's worth.

Q Pardon?

A I sold him a dollar's worth. He came in every morning. He usually got a dollar's worth.

Q Did you sell him a dollar's worth that morning?

A Yes, sir, I did.

Q At the time this lady came across the street, where was the gentleman? In or out of his car?

A In his car. Then he got out to get cigarettes.

Q Did you have a conversation with that man before he got out to get the cigarettes?

A Just put the gas in there. That's all.

Q Now, what, if anything, did this lady do while this gentleman was getting cigarettes?

A She asked me could I get her started. I told her I couldn't. She was going to call her husband to see if he could get her started.

Q Did she go to the phone?

A Yes, sir.

Q Is there a phone booth there?

A Right. Right.

Q When this woman was in the phone booth, where was this gentleman who asked for the gas?

A Right by the cigarette machine.

Q What did you hear him saying to the lady, if anything?

A He said to her that he would try to get her started if he could.

Q And what did you see them do?

A I seen him walk over to her car and open her hood to try to get the car started.

Q You saw this?

A Yes, sir. The car was right at the stop sign. He said the battery was dead. He got in the car, going to push her to get started.

Q He had to push her?

A Yes, sir.

Q How close were you to this man, the closest during that morning, sir?

A About from here to that lady right there. (Indicating.)

Q Did you have occasion to observe this individual walk and speak?

A Yes, sir. I remember vaguely that the car he was driving was wrecked on the front end.

Q To your knowledge, sir, was this person intoxicated, this man?

A I believe he had been drinking. I could smell a little bit of beer on his breath. He wasn't drunk. He was drinking.

Q You smelled some beer on his breath?

A Yes, sir.

Q To your knowledge or in your opinion, was he drunk?

A No, sir, he was not.

Q When he walked across the street, did this woman go over with him?

A Yes, sir. She was in the car, trying to start the car.

Q He was at the battery?

A Behind the hood. Yes, sir.

Q About how long did you observe him trying to start the car?

A I figure about three or four minutes, about that. Then he came over to me, asked if I had a jumping cable.

Q He asked if you had a jumper cable?

A Yes, sir. I told him I did not.

Q And you sold this gentleman gas on that morning?

A Yes, sir, a dollar's worth of gas.

MR. NUNZIO: No further questions.

CROSS-EXAMINATION

BY MR. IANNI:

Q Mr. Aldrich, you say it had started to get light?

A Yes, it was beginning to get light, yes.

Q And it is your testimony you never went over to the car to try to start it?

A No, sir, I did not. I couldn't leave the station, I was by myself.

Q Was he already there before she came?

A Yes, sir.

Q So he was there before she came?

A Yes, came in about a half second or two or three seconds before she came in.

Q And how long had you worked at that station?

A I'd worked there at the time about four months.

Q During your course of employment there, did you ever run out of gas?

A Yes, sir, we have.

Q Were you out of gas that morning?

A No, sir.

REDIRECT EXAMINATION

BY MR. NUNZIO:

Q Do you see the man in the courtroom today who bought the gas that morning?

A Yes, sir.

Q Where is he?

A Sitting there. (Indicating.)

MR. NUNZIO: May the record reflect that the witness has identified the defendant, Your Honor?

THE COURT: Yes.

MR. NUNZIO: I have nothing further of the witness, Your Honor.

MR. IANNI: I have nothing further.

(The witness stepped down.)

MR. NUNZIO: I would like to recall the defendant for one question, Your Honor.

THE COURT: Very well.

Thereupon

BARRINGTON JOSEPH JOHNSON

resumed the witness stand and further testified as follows:

DIRECT EXAMINATION

BY MR. IANNI:

Q Mr. Johnson, do you smoke?

A No, sir.

MR. IANNI: Nothing further from the witness, Your Honor.

(The witness stepped down.)

THE COURT: Come to the bench, gentlemen.

(AT THE BENCH:)

THE COURT: How much time do you need for summation?

MR. IANNI: I don't think I need much more than half an hour, Your Honor.

MR. NUNZIO: Thirty-five or forty minutes. I will time myself according to him.

THE COURT: Can we finish the summations before lunch?

MR. NUNZIO: Yes, Your Honor.

MR. IANNI: Yes, Your Honor.

THE COURT: You handed me three requests, Mr. Ianni. Let me get them in order.

Have you seen these, Mr. Nunzio?

MR. NUNZIO: No, Your Honor, I haven't seen them.

MR. IANNI: Oh, I'm sorry.

(Mr. Ianni handed a copy of the requested instructions to Mr. Nunzio.)

THE COURT: Number 1, all of these are embraced in substance in the normal charge on rape. So I am going to

mark them as granted in substance. They won't be in your exact words.

MR. IANNI: Your Honor, I have one other.

THE COURT: Do you agree, Mr. Nunzio?

MR. NUNZIO: I would agree to the substance, not to these specific words, namely, "must be resistance." I think the Court's instructions encompass generally everything here.

THE COURT: I use the standard instruction.

MR. IANNI: I've got that the threats must be of such a nature which put the woman in fear of death or grave bodily harm, or these combined with some degree of physical force.

MR. NUNZIO: That is covered in the Court's instruction in the book.

THE COURT: Is that Judge Edgerton's opinion where he said that it is not enough for a woman to say, "I was scared"?

MR. IANNI: Yes, Your Honor.

MR. NUNZIO: We rely on the other case cited to the Court, Your Honor.

THE COURT: All right.

(END OF THE BENCH CONFERENCE.)

THE COURT: Are you prepared to sum up, Mr. Nunzio?

MR. NUNZIO: Yes, Your Honor.

THE COURT: Go ahead.

(After arguments of counsel and the luncheon recess, at 2:08 p.m., the Court instructed the jury as follows:)

CORCORAN, J.: Ladies and gentlemen of the jury, we now come to that point in the trial where it becomes my duty to charge you as to the law which you are going to apply to the facts as you find the facts.

Preliminarily and before I get into the substance of my charge, let me recall to you and re-emphasize to you certain matters which I am sure have been called to your attention before, but which I think you should keep uppermost in your mind as you deliberate.

First, bear in mind that the statements of counsel are not evidence in the case. It is perfectly proper for counsel,

as advocates for their respective sides, to emphasize and draw certain inferences from the evidence as they see it and generally expound their theories of the case to you; but it is for you, the jury, to find the facts. And if your recollection of the evidence differs in any respect from that of counsel, then your recollection is to govern.

Secondly, you are not to draw any inferences or be influenced one way or the other as to the guilt or the innocence of this defendant by any ruling or comments I may have made during the course of the trial. It is my function to try to conduct the trial in an orderly way, to make rulings on proffered evidence, to exclude evidence which should not properly come before the jury, and generally to try to keep the situation going in an orderly way.

In ruling, if I had to rule, and in commenting, if I did comment, it was not my intention to emphasize any particular piece of evidence or to say anything from which an inference as to the guilt or innocence of this defendant might be drawn. That is your function, and I have no right to interfere with it.

Lastly, and again as a preliminary matter, let me re-emphasize the fact that the indictment raises no inference of guilt. An indictment is only a piece of paper on which charges are written. It is a means by which we bring home to a defendant the charges which he must meet in open court; but the indictment, as such, is only a piece of paper, it is not evidence in the case; it is not a basis for any inference one way or the other.

Now we come to your function in the case. You are the sole judges of the issues of fact in this case.

Do not guess or speculate as to the existence of any fact, but base your judgment on the evidence you have heard from the witness stand, upon the various exhibits which have been introduced into evidence and upon any inferences which are reasonably deducible from that total bundle of evidence.

As to the exhibits, I am sure you know now, as experienced jurors, that you are permitted to examine any exhibit that has been properly admitted into evidence. If you send for it, it will be sent to you in the jury room.

You must weigh and consider this case without regard

to sympathy, passion or prejudice for or against the defendant.

Now, although you are the sole judges of the issues of fact, you must look to this Court as the authority on the law, and you are duty bound to follow the law as I shall attempt to outline it to you.

Every defendant in a criminal case, under our United States system of criminal jurisprudence, is presumed to be innocent, and that presumption of innocence attached throughout the whole trial. A defendant is not required to establish his innocence under our system of criminal jurisprudence, but rather the burden is on the government to prove him guilty beyond a reasonable doubt as to every element of the offense charged. And if the government fails to sustain that burden, then you must find the defendant not guilty.

Now, what is meant by "reasonable doubt"?

It does not mean any doubt whatsoever. As the phrase would imply, a reasonable doubt is a doubt which is based upon reason. It is a doubt for which you can give a reason. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life.

A reasonable doubt is not a fanciful doubt. It is not a whimsical doubt. It is not a doubt based upon guess work or conjectur. It is, as I say, a doubt based upon reason, a doubt for which you can give a reason.

Now, although the government carries that very heavy burden of proving guilt beyond a reasonable doubt, it is not required to establish guilt beyond all doubt or to establish guilt to a *mathematical or a scientific certainty. Its burden* is only to establish guilt beyond a reasonable doubt.

In a trial, as in our every day affairs when we are called upon to determine disputed questions of fact, there are two kinds of evidence upon which we base our conclusions.

The first is so-called direct evidence. That is, what a witness saw or heard as an eyewitness to a particular event under inquiry.

The other type of evidence is indirect or so-called circumstantial evidence. You have circumstantial evidence

when one fact is proven and when a reasonable person can logically deduce or infer from the proven fact the existence of another fact.

For example, supposing that the testimony establishes to your satisfaction the existence of Fact "A." Now, with Fact "A" established, reasonable people, applying their every-day experience and their common knowledge, can infer or deduce that Fact "B" must also have existed, even though there is no direct evidence of Fact "B."

Let me put a homely example to you. Suppose you were walking on a deserted beach, and you saw human footprints in the sand, but you don't see any other person there. From your common knowledge, from your every day experience, you are able to recognize the human footprints, so you immediately deduce, as reasonable people, that someone must have been there before you. In other words, you deduce from Fact "A," the human footprints, the existence of Fact "B," that someone else was there before you.

Now, both kinds of evidence, direct and circumstantial, have been introduced into this case, and I would instruct you that both are equally entitled to your consideration. Accord them, both kinds, the same weight, whether it be direct or circumstantial. But in the long run, that total bundle of evidence, direct and circumstantial, must satisfy you beyond a reasonable doubt as to the guilt of the defendant for a conviction to follow.

One of the principal functions that you must face up to as jurors is to weight the credibility, that is, the believability, of the various witnesses who appeared before you on the stand.

You are the sole judges of the credibility, the believability, of any witness who testified before you. You alone are to determine whether to believe any witness, and the extent to which any witness should be believed.

If there is any conflict in the testimony, it is your function as jurors to resolve that conflict and to determine where the truth does lie.

In reaching a conclusion as to the believability of any witness and in weighing the testimony of any witness, you may consider any matter that may have a relevant bearing. You may consider the demeanor and the behavior of the

witness on the witness stand. You may consider the witness's manner of testifying, whether he impressed you as a truthful individual, whether he impressed you as having an accurate memory and recollection as to the things to which he did testify, whether he has any motive for not telling the truth, whether the witness had full opportunity to observe those things about which he did testify, whether the witness has any interest in the outcome of this case, whether the witness has demonstrated friendship or animosity toward any person concerned in the case. Consider the reasonableness or the unreasonableness, the probability or the improbability of the testimony that you heard. Consider whether the witness has been contradicted or contradicted on material facts in this case by other credible evidence.

If you believe that any witness has shown himself to be biased or prejudiced for or against either side in this case, you may consider whether that bias or prejudice has so colored the testimony of that witness as to affect his desire and his capability of telling you the truth.

If you believe that any witness has willfully testified falsely with respect to any material fact about the truth of which he could not reasonably be mistaken, then, if you see fit to do so, you may disregard all or any part of the testimony of that witness, or you may accept such part of it as you believe to be true.

Now, as you know from your experience as jurors, a defendant, under our system of jurisprudence, is not required to take the stand in his own defense. He is not required to establish his own innocence; and if he fails to take the stand, you are not permitted to draw any inference from that failure.

The defendant here, however, did take the stand. So I would instruct you that where a defendant does take the stand, does testify in his own behalf, he occupies the same position as any other witness. He is subject to the same scrutiny. His testimony is subject to the same tests as the testimony of other witnesses. And you, the jury, have the right to take into consideration his situation and his interest in the outcome of the verdict; and you give to his testimony such weight as, in your judgment, it is fairly entitled to.

In this case we have had the testimony of expert witnesses.

A person who, by education, study and experience, has become expert in his science or profession and who is called as a witness may give his opinion as to any such matter in which he is versed and which is material to the case. That is an exception to the rule.

You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not, however, bound by the opinion of any expert. Give it the weight to which you deem it entitled, whether it be great or slight; and you may then reject it if, in your judgment, the reasons given for it are unsound.

We come now to the indictment. When you retire to the jury room, you will be permitted—I will hand you a copy of the indictment before you go to the jury room. But, again, let me re-emphasize the fact that the indictment raises no inference of guilt and is not evidence in this case. You will be permitted to take it to the jury room for your guidance, but do not treat it as evidence.

The indictment in this case reads as follows:

> That on or about January 22, 1967, within the District of Columbia, Barrington Joseph Johnson had carnal knowledge of a female named Luella E. Mayes forcibly and against her will.

That, under the District of Columbia Code, constitutes the crime of rape.

The words "carnal knowledge" are synonymous with sexual intercourse.

In plain English, "rape" may be defined as having sexual intercourse with a female forcibly and against her will.

Now, what are the essential elements of this crime of rape which the government must prove beyond a reasonable doubt for a conviction to follow?

They are these:

First, that the defendant had carnal knowledge, that is, sexual intercourse, with the complainant in the District of Columbia.

And secondly, that the intercourse was performed or committed forcibly and against the will of the complaining witness, in this case Mrs. Mayes.

Now, as to the first element, the carnal knowledge, there must have been penetration by the male organ of the female organ. The slightest pentration is sufficient. Emission or ejaculation is not necessary, but you must be satisfied beyond a reasonable doubt that the defendant did cause his organ to penetrate the female organ.

If you so find, then you proceed to consider the second element.

Now, the second element, as I have said, is that the intercourse be forcible and against the will of the complaining witness. That is, the complaining witness did not consent to the act.

To justify a conviction for rape, you must be satisfied beyond a reasonable doubt that the complainant did not consent to the act of sexual intercourse. Consent is a complete defense to the charge of rape, because when there is consent, the act is not committed forcibly and is not committed against the will of the complaining victim. If you find consent on the part of the complainant, then you must find the defendant not guilty.

The amount of force that is embraced within that "forcibly and against consent" is relative, and it depends on the circumstances of the case; but it must have been sufficient to put the resisting woman within the power of the man and to enable him to have sexual intercourse with her, despite good faith resistance on her part.

Normally, the woman must, to the extent of her ability, try to prevent the act of sexual intercourse. She must resist and continue to resist as long as she has the power to do so, until the act is finally consummated.

There is, however, one situation in which actual resistance by the woman is not required, and that is where she has been put in fear of death or serious bodily harm. The fear must be substantial, of course, and not fanciful. The fear must be the result of words or actions on the part of the defendant which creates in the woman a reasonable apprehension of death or great bodily harm. It is not enough for a woman merely to say, "I was scared," to establish her lack of consent. Her fear of death or great bodily harm must be something real.

Now, consent to intercourse may also be implied. Consent

to intercourse occurs when the accused would have been justified in assuming the existence of consent because of the conduct of the complaining woman. If her conduct was of such a nature as to create in the mind an honest and reasonable belief that she was yielding her will or submitting to the act, then the accused would have been justified in assuming that she had consented.

In this connection you should consider carefully all the circumstances leading up to and attending the alleged act of intercourse, if you find the act was committed.

Furthermore, you should bear in mind that the defendant is not required to prove consent. On this point, as on every other element of the offense, the government has the burden of proof. Here the government must show the unwillingness of the complainant.

If you are satisfied that the government has proved beyond a reasonable doubt that the defendant had sexual intercourse with the complaining witness, forcibly and against her will, then you should find him guilty as charged.

However, if you have a reasonable doubt, as I have explained that term to you, as to whether the defendant had sexual intercourse; or, if he did, whether the sexual intercourse was forcibly and against the will of the complainant, then you must find him not guilty.

Now, the law does not permit the conviction of rape on the basis of the testimony of the complaining witness standing alone and by itself. Her testimony must be corroborated. To the extent to which you may find the testimony of the complaining witness is not corroborated, you may not consider her testimony as evidence in this case.

Before you may consider the testimony of the complainant as evidence on the matter of what is known in legal terms as the "corpus delicti," you must find that her testimony in this regard has been corroborated. "Corpus delicti" means the fact that a crime has been committed, and in a case of rape the corpus delicti is the occurrence of the act of sexual intercourse with a female, forcibly and against her will.

You may not find that such an offense occurred solely on the basis of the testimony of the complaining witness. It is your duty as jurors to determine whether there are

corroborating circumstances which support the testimony of the complaining witness as to the act of sexual assault. To that end, you should consider all the facts and circumstances surrounding the alleged assault, such as things said and things done before the act, the things said and things done during the alleged act, and the things said and things done after the alleged act.

In this regard, you may also consider the testimony of the expert witnesses, to which I have alluded before.

Now, in addition, before you may consider the testimony of the complaining witness as evidence on the matter of identity of the person who committed the offense, you must find that her testimony in this regard has also been corroborated. You may not find that the defendant committed the alleged offense solely on the basis of the testimony of the complaining witness.

This requirement of corroboration means that there must be evidence independent of the testimony of the complaining woman of facts or circumstances which tend to support the testimony given by her. This evidence, as I said before, may be either direct or circumstantial.

Unless you find that the testimony of the complainant was corroborated and the other evidence in the case, when taken as a whole, established beyond a reasonable doubt all the essential elements of the offense, you must find the defendant not guilty.

If you do find that the defendant had sexual intercourse with the complainant against her will and without her consent and that there are other circumstances surrounding the alleged assault which offer corroboration, over and above her statement, then you may find the defendant guilty of the crime of rape.

Now, there are two possible verdicts in this case—I want you to listen very carefully to this portion of my charge: The first is not guilty. Of course, if you find that the defendant is not guilty, that is the end of the case, and you should return your verdict to that effect.

If, however, you are convinced beyond a reasonable doubt that the defendant is guilty of the crime of rape, then the statute provides that you may, if you unanimously agree to do so, recommend to the Court that the death penalty

attach. The government is not seeking the death penalty. I repeat: The government is not seeking the death penalty, but you may, if you wish to do so, add the words, "with the death penalty," to your verdict guilty, if you find him guilty.

If you do not wish to have the death penalty imposed, or if you are unable to agree that the death penalty should be imposed, then you should merely return a verdict of guilty, and the Court will impose an appropriate penalty in due course.

Now, you are directed that your verdict must be the considered judgment of each juror. If you return a verdict, it is necessary that each juror agree thereto, and your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after a consideration of all the evidence with all of your fellow jurors. In the course of your deliberations do not hesitate to change an opinion, if at a given moment you are convinced that that opinion is erroneous. On the other hand, do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict.

When you retire to your jury room to deliberate, elect one of your number as foreman or forelady of the jury who will speak for you when you return your verdict and conduct your operations in a business-like way.

If at any time during the course of deliberating, you wish to be in touch with the Court, you will find a Marshal in attendance at the jury room door. If you will pass a note to him, he will see that it is brought to the Court's attention in due course.

A word or two of caution about the use of notes: If we do have occasion to communicate, do not destroy the notes. They become a part of the permanent record in this case. And do not indicate in any given note how you stand numerically at any given time. Don't send a note saying, "We are eleven to one, nine to three, ten to two," or what-

ever it happens to be at any given moment. Keep the number count within the jury room until you return your final verdict.

Gentlemen, will you approach the bench, please.

(AT THE BENCH:)

THE COURT: Is there anything further?

MR. NUNZIO: Nothing further, Your Honor.

MR. IANNI: Nothing further, Your Honor.

THE COURT: All right.

(END OF THE BENCH CONFERENCE.)

THE COURT: Mrs. Hughes and Miss Reid, I am permitted to send only the twelve original jurors into the jury room to deliberate, so at this time I will have to excuse you, with the thanks of the Court. Will you return to the jury lounge for further assignment, please.

Do you have any goods or effects in the jury room? If so, you may get them.

(Whereupon, at 2:29 p.m., the alternate jurors were excused, and the jury retired to deliberate.)

THE COURT: Mr. Ianni, if you have occasion to leave the court house, will you leave word where you can be reached.

MR. IANNI: Yes, Your Honor.

THE COURT: I asume that I can send to the jury, without further ado, any exhibits they send for?

MR. IANNI: Yes, Your Honor.

MR. NUNZIO: Your Honor, I think I have been reassigned back here. Could I have fifteen minutes, please?

THE COURT: I need that much time myself.

(Whereupon, at 2:30 p.m., the Court recessed.)

(At 4:50 p.m., the jury returned to the courtroom, and the following proceedings were had:)

THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: We have.

THE DEPUTY CLERK: What say you as to the defendant, Barrington Joseph Johnson, on count one, rape?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Members of the jury, your foreman says that you find the defendant, Barrington Joseph Johnson, guilty, and that is your verdict, so say you each and all?

THE JURORS (in unison.): I do.

MR. IANNI: May the jury be polled, Your Honor?

THE COURT: The jury may be polled.

(Whereupon, the Deputy Clerk polled the jury.)

THE COURT: The jury has been polled. The Court will accept the verdict of the foreman.

Ladies and gentlemen, I am very appreciative of the services you have rendered to the Court. It has not been a pleasant case to try. That is the way it is sometimes.

Thank you again, and would you report back to the jury lounge on Wednesday morning. You don't have to report tomorrow. Report on Wednesday morning at the usual time at the jury lounge. Good night.

THE JURORS (In unison.): Good night, Your Honor.

(Whereupon, at 4:54 p.m., the jury left the court room.)

MR. IANNI: Would Your Honor consider allowing the defendant to remain on bond pending a presentence investigation? Of course you heard the testimony that he is living with a woman who has borne three of his children. He does work. I believe that he's lived in the District of Columbia most of his life. He does have one prior conviction. However, he's been out on personal bond for some period of time. He was picked up, I think, through a mixup in the precinct, Your Honor, and I think after Judge Gasch heard all the facts on my motion, most of which were verified, that he allowed him to remain on bond after that.

That mixup, Your Honor, was that apparently he had gone to the precinct to sign in. They said that they thought there was another charge. After spending about an hour and a half in the precinct trying to find out what the other charge was, they determined there was no other charge; and in that confusion he forgot to sign in, but he has reported every twenty-four hours at the precinct and signed in.

THE COURT: That was prior to this conviction.

MR. IANNI: I beg your pardon, Your Honor?

THE COURT: That was prior to this conviction.

MR. IANNI: That is correct, Your Honor.

THE COURT: Mr. Nunzio?

MR. NUNZIO: Your Honor, our office directive says that in any crime of force and violence, after conviction, our

position is that the defendant should be committed. This man has been convicted in a capital case. He stands to be sentenced. I maintain that the reasons for flight would now be uppermost in his mind. If he were to flee. I merely say that he has been convicted.

THE COURT: Yes. I won't entertain your application. The circumstances now are completely different from the time before trial.

I am going to commit him to the custody of the Marshal, and order a presentence investigation.

MR. IANNI: Thank you, Your Honor.

THE COURT: Thank you, Mr. Ianni, for your service to the Court. And thank you, Mr. Nunzio.

MR. IANNI: Thank you, Your Honor.

MR. NUNZIO: Thank you, Your Honor.

(Whereupon, the trial was concluded.)

SENTENCE: U. S. v. BARRINGTON J. JOHNSON

CR. NO. 335-67

February 23, 1968

BEFORE: HONORABLE HOWARD F. CORCORAN, JUDGE

APPEARANCE:

On behalf of the Government:
EARL J. SILBERT, Ass't U. S. Attorney
EDWARD F. DOCEKAL, Probation Officer

On behalf of the Defendant:
SAMUEL F. IANNI, ESQ.

PROCEEDINGS:

THE DEPUTY CLERK: Criminal No. 335-67, United States versus Barrington Johnson; Mr. Silbert for the Government and Mr. Ianni for the defendant.

(The defendant was brought before the Court.)

MR. IANNI: Good morning, Your Honor.

THE COURT: Good morning.

Mr. Ianni, do you have anything to say on behalf of the defendant?

MR. IANNI: If Your Honor pleases, I am Samuel F. Ianni and, of course, I represent the defendant. I know that now is not the time to argue a case but the charge here, rape, is such a terrible crime that I think I ought to make a couple of comments about the testimony that transpired in the trial. As Your Honor will recall, this was a rape case in which the complainant stated that the defendant here helped her push her car and after he got her to wherever she was going, he got her out of her car and then drove to a place where the rape was committed.

Just taking her testimony at its very best, Your Honor, it wasn't a vicious crime as a crime of rape normally is. As far as the evidence showed, she was not bruised in any way. There was no evidence that the defendant used

any force on her whatsoever or that she had any after effects of this crime. A period of time has gone by where the act has not resulted in a pregnancy.

By those statements, Judge, I don't want to minimize that rape isn't a serious crime, it certainly is, but I just wanted to point out to the Court that this rape in its most favorable light from the complainant's testimony was not in itself as vicious a crime as the crime of rape normally is.

To that, I would add, Your Honor, that the defendant is married. Of course, there was also this problem of a prior marriage, but I certainly think he definitely has a valid common-law marriage at this time with the woman he has been living with and has fostered three children of his whom he was supporting. There is evidence that at various times he worked at least two jobs. He was working at a seasonal job with a construction company in addition to working parttime at a fuel company also.

I normally wouldn't ask the Court for probation in a rape case because of the seriousness of the crime but I feel that if that charge ever or if probation could be considered on that charge, I think this would be the case that the Court should definitely consider it. And I would ask, of course, the Court to be as lenient as possible on him because I think that this young man can be made to be a good and useful citizen. There is some evidence of that. There is ample evidence that he is a hard worker.

I also might state, Your Honor, that I am aware that he did have a past record on a charge which was similar to this; and he tells me that what occurred in that that he felt at that time he was not guilty and when he had an opportunity to plead to a much lesser charge, he seized that opportunity because he felt that this was the easiest way out for him.

Once again I state I think that if this man is given an opportunity, he can be a good, useful citizen and will probably straighten himself out.

THE COURT: Mr. Johnson, do you want to say anything?

THE DEFENDANT: Thank you, Your Honor.

I just want to say that even though I have been found guilty of this, I didn't have anything to do with this. I wasn't involved in this crime. And you can look at my previous record. If I was crazy or something, maybe I would do something like this but honestly, you have my word, I wasn't involved in this, no more than pushing the car and it has caused my family a little problem now that my girl lost our apartment and I was under the impression that she moved up to her sister's house in the basement, but I found out later that she moved up there with the three kids and they are sleeping in the living room. The furniture is stored in the basement. That's pretty hard because the kids are used to having their own room for themselves. With the money that girl makes, she can't support the kids and have an apartment of her own. We were to be married this month after my divorce. I was divorced last month. Then I got in here. I don't know what's going to happen to the kids.

I would appreciate it if you would be as lenient on me as you could. And if you feel that you do have to sentence me to do some time, I would like to go to a federal penitentiary where I could make some money or if you could give me some kind of work program here and let me report to jail every day, something like that, anything so I could provide for my family as much as possible.

Thank you.

THE COURT: Well, of course, what you both are doing is trying to second guess the jury. I can't do that either. The jury says you are guilty of rape.

There are no degrees of rape, Mr. Ianni. There is no good rape, bad rape and medium rape; it is rape. The jury said he is guilty, and I am not second guessing the jury.

I do have the evaluation report of the Probation Department, and after their thorough investigation, they are not anxious to take him on as a probationer and I can fully understand why.

I am going to sentence you, Mr. Johnson, to a peniten-

tiary to be designated by the Attorney General for a period of not less than six nor more than eighteen years.

You, of course, have a right to appeal from this judgment. I am sure Mr. Ianni will advise you as to how to perfect your appeal. If you have any problems with it, talk to the clerk and he will talk to the Court to see that the necessary papers are filed.

MR. IANNI: Could Your Honor set an amount for an appeal bond?

THE COURT: No. He will stand committed.

* * * * *

The foregoing is certified to be the official transcript of proceedings indicated.

Eva Marie Sanche
Official Court Reporter

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,851

BARRINGTON JOSEPH JOHNSON,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court
for the District of Columbia

Decided June 20, 1969

*Mr. William J. Lippman* (appointed by this court) for appellant.

*Mr. Daniel E. Toomey*, Assistant United States Attorney, with whom *Messrs. David G. Bress*, United States Attorney at the time the brief was filed, *Frank Q. Nebeker*, Assistant United States Attorney at the time the brief was filed, and *Nicholas S. Yanzio*, Assistant United States Attorney, were on the brief, for appellee.

Before FAHY, *Senior Circuit Judge*, BURGER and MCGOWAN, *Circuit Judges*.

PER CURIAM: This appeal comes to us following Appellant's District Court jury trial conviction for rape. 22 D.C. CODE § 2801. Appellant stresses the factually-oriented issue of consent and alleges the Government's failure to establish

a prima facie case of lack of consent by the complaining witness.

(1)

At trial, the emphasis was on the conflicting testimony offered by the Complainant and Defendant on the issues of the actual physical act and consent thereto.

The complaining witness testified that she met Appellant at a gas station in the early morning hours when her car stopped as she proceeded to work at St. Elizabeths Hospital. Appellant offered to push her car the short distance to the Hospital parking lot, and after he did, he pulled her into his car and left the area. Complainant testified that she was "scared to death" but made no attempt to scream at this point. She testified that Appellant kept repeating that he would not hurt her if she did not scream. Appellant stopped at another gas station to purchase gasoline, and he placed his arm around her neck again telling her not to scream. He thereupon drove to a deserted street saying that there was "no use screaming because no one would hear"; it was here that the attack took place. As to her mental and emotional state at the time, she related that: [D]uring the whole time, I was scared to death because I really thought he was going to kill me. I never thought he would take me back to work." She did not cryout, although she testified that she kept begging him to take her back to work.

Thereafter, Appellant drove her back to St. Elizabeths Hospital where she reported the incident to her supervisor and the police who were summoned to the scene;[1] an exami-

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[1]On the return to the Hospital Appellant said that he would return to St. Elizabeths that afternoon to help her start her car but he thought she would "probably have policemen everywhere"; she replied that she would not. As they entered the grounds, he asked for her car keys and also requested a piece of paper on which he wrote the name "Charles" and his phone number.

[continued]

nation was made at D.C. General Hospital. That afternoon she was returned to St. Elizabeths parking lot to identify Appellant who had returned to the lot in the same car that she had described that morning.[2]

To corroborate Complainant's testimony the Government called the director of the pathological department of D.C. General Hospital whose testimony confirmed recent relations; an FBI specialist in the microscopic examination of fibers and textile materials testified that he found numerous woolen fibers on Complainant's clothing having the same characteristics as the fibers of the sweater Appellant was wearing at the time of the attack.

The principal thrust of Appellant's case at trial was that although he admitted meeting the Complainant, pushing her car, and returning to the Hospital parking lot to help her start it that afternoon; she had never been in his car and he had no contact with her.[3]

Appellant admitted having Complainant's car keys at the time of his arrest but said that she had given them to him so that he could return to start her car. He also testified that he could not recall whether Complainant was wearing gloves that morning, and he had no recollection how her white gloves had come to be in his car at the time of his arrest.

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Later in the trial, the defense called a Detective Perry who verified that the telephone number on the envelope mentioned above was Appellant's correct telephone number; however, the paper had been misplaced in police custody.

[2] At the time of his arrest, Appellant had Complainant's car keys in his possession. The Complainant also identified as hers a pair of white gloves found in Appellant's car at the time of his arrest.

[3] In his closing argument, trial counsel for Appellant argued both the absence of any sexual encounter and the issue of nonconsent:

> One more thing. I'm going to argue consent, and I'm going to argue consent because, of course, there is evidence of it, but I don't concede one second that the act of intercourse took place. I want you to understand that. The defendant has this right.

(2)

As noted above, the focus of Appellant's case on appeal is his assertion that the Government failed to establish a prima facie case of lack of consent by the complaining witness. As an alternative to this proposition, he also contends that even if the trial court did not err in failing to take the case from the jury and directing a verdict of acquittal, the evidence in its totality was clearly insufficient to sustain the jury's verdict of guilty.

Before the Appellant can effectively challenge the trial court's decision to send this case to the jury, he must establish that at the point when the motion for acquittal was made the Government had not introduced

> such evidence that reasonable persons *could* find guilt beyond a reasonable doubt. It is not a requirement that the evidence *compel*, but only that it is capable of or sufficient to persuade the jury to reach a verdict of guilty by the requisite standard.

*Crawford v. United States*, 126 U.S. App. D.C. 156, 158, 375 F.2d 332, 334 (1967) (emphasis in original); *accord, e.g., Thompson v. United States*, ___ U.S. App. D.C. ___, 405 F.2d 1106 (1968); *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

In challenging the validity of the trial court's determination, Appellant presents a staccato list of points which are said to militate against a finding of non-consent. Among those offered are the Complainant's failure to forcefully resist, her failure to scream out or attempt escape, the fact that she removed her own clothing, and the absence of any weapon. Indeed, like many records in rape cases, the evidence is not always clear-cut. Nevertheless, the evidence presented in the Complainant's testimony was not in itself incredible as was that of the complaining witness in *Farrar v. United States*, 107 U.S. App. D.C. 204, 275 F.2d 868 (1960), a case upon which Appellant places great reliance.

In denying the Government's petition for rehearing *en banc* in *Farrar* and thereby preserving this court's earlier reversal of a conviction for rape, then Chief Judge Prettyman explained that acquiescence may be deemed non-consensual in the absence of force if the victim is put in genuine apprehension of death or bodily harm. The determinative factor in *Farrar* was that "[t]he complaining witness rested her claim of fear upon a simple physical fact a knife." *Id.* at 212, 275 F.2d at 876. "The only basis for fear advanced by the prosecutrix was the knife; she suggested no alternative cause for fear." *Id.* at 213, 275 F.2d at 877. When this court found it incredible that the complainant had been coerced by a knife for a two or three hour period and had "submitted" to multiple acts of intercourse, and yet never saw the knife, the conviction could not stand in the absence of any viable alternative cause for the prosecutrix' "fear" of her attacker. Indeed, the sitting division in *Farrar* found that her participation in the acts of intercourse were not induced by threats or "by words of any sort." *Id.* at 204, 275 F.2d at 868.[4]

In the instant case, the Complainant's relation that she was "scared to death because I really thought he was going to kill me" was not based on a nondiscoverable weapon or any other theory of fear which was incredible on the basis of her own testimony. It was based on a *general fear of her assailant* who had dragged her from her car, kept his arm around her neck when they stopped for gas, drove her to a deserted location, told her it would be useless for her to scream because no one could hear, and kept telling her that he would not hurt her if she did not scream. In these circumstances, this court's observations in *Ewing v. United*

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[4]Other facts which bore on the credibility of the complaining witness' testimony in *Farrar* also distinguish it from this case. In *Farrar* the girl was accosted on a public street and walked two or three blocks to her assailant's room; both the street and room were lighted, thereby facilitating her observation of any weapon she thought he had; the incident stretched over a two to three hour period during which time her assailant left her alone in his room.

*States*, 77 U.S. App. D.C. 14, 16, 135 F.2d 633, 635 (1942), *cert. denied*, 318 U.S. 776 (1943) (emphasis added), are worth reiterating:

> There are cases, especially older ones from other jurisdictions, which seem to require resistance to the victim's ultimate physical powers in order to sustain conviction for this crime. But the law is no longer in this last-ditch stage. Whatever it may have been in other times, it is generally settled now that *consent is not shown when evidence discloses resistance is overcome by threats which put the woman in fear of death or grave bodily harm*, or by these combined with some degree of physical force.

Therefore, despite Appellant's protestations of "an insurmountable evidentiary gap on the consent issue," we feel that the trial judge correctly viewed the evidence as such "that a reasonable mind might fairly have a reasonable doubt *or might not* have such doubt" on the question of consent. *Crawford*, *supra* at 158, 375 F.2d at 334 (emphasis in original). The District Judge was required to view the evidence at the close of the Government's case in the light most favorable to the Government's position.[5] Having made this determination based on testimony which was not inherently incredible, the case was for the trier and not the trial judge, and the motion for directed verdict of acquittal was properly denied.

Appellant's contention that the totality of the evidence adduced at trial was insufficient to sustain the jury's verdict is also unavailing. Appellate counsel makes a concerted attack on the credibility of the Complainant, pointing out various specific inconsistencies between her testimony and that of other witnesses,[6] and even raises a "number of

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[5] *See* Thompson v. United States, *supra*; Crawford, *supra*; Thomas v. United States, 93 U.S. App. D.C. 392, 211 F.2d 45, *cert. denied*, 347 U.S. 969 (1954); Curley, *supra*.

[6] Examples are: her statement that Appellant arrived at the gasoline station after she did as contradicted by the attendant's relation of the sequence of arrivals; her denial that she asked for leave when

nagging questions" concerning certain witnesses who were not called by the prosecution *or defense*.[1] Admittedly, the trial and this record is not a model of symmetrical components but difficult criminal trials seldom are; this is inherent when none but victim and attacker are present. What does emerge from the record, however, is the critical importance of credibility on the key issue of consent. Present counsel recognizes this reality by conceding that the consent issue focused on the Complainant's credibility, he argues:

> The only evidence to rebut the strong inference of consent . . . is the complaining witness's . . . *Obviously, the jury believed the testimony.* Equally obviously, however, the jury should not have believed her testimony because (1) her alleged fear was not shown to have a reasonable basis and (2) her story was inherently incredible, i.e. inconsistent with other testimony and contradicted by human experience.

Brief for Appellant at 19 (emphasis added).

We do not agree that the circumstances which surrounded her abduction, the isolated locale of the actual attack, and the threats of her attacker were an insufficient basis for reasonable fear if the victim's testimony is credited. Nor can we agree that her testimony was inherently incredible. The jury was properly allowed to consider and resolve the issue of the credibility of the key witnesses in deciding whether the Complainant's will had in fact been overborne. Of all the issues which are in the highest order for a jury one is hard pressed to suggest one more firmly intended and

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she arrived at the supervisor's office as contrasted with the supervisor's recollection to the contrary; her testimony that the crime took place on the front seat of Appellant's car whereas the expert witness was unable to find any strands of thread matching her clothing on the seat.

[1] Examples include the Government's failure to call the Complainant's husband or the attendant from the second gas station where Appellant stopped when she was in the car. However, there is no indication that these witnesses were not equally available to the defense. See pp. 9-10 *infra*.

more plainly suited for jury determination than that of credibility. We cannot say their verdict on this point was without reasonable foundation, and whatever our own resolution might be were we to decide the fact issues had we been the triers this verdict was within the proper range of permissible alternatives for the finders of fact.

Testimony reduced to the printed words can have the appearance of truth when not one of those who saw and heard the witness believed him; to the contrary a printed version which may arouse skepticism in the reader can reflect testimony which, to those who heard it, was filled with the clear ring of truth and hence believed. It is a rare case indeed, when twelve jurors *believe* and the trial judge who also saw and heard, fails to exercise his power to set the verdict aside, that an appellate court ought to intervene. That authority is a reserve power to be used only to prevent manifest injustice. This record, viewed as a whole as the jurors viewed it in no sense suggests any miscarriage of justice.

As we noted in *Crawford, supra*, the standard for the jury's determination of guilt beyond a reasonable doubt is stricter than the test to be applied by the trial court in determining whether a case may go to the jury at all. But when evaluating the basis of the jury's resolution of the issue of guilt, we must remember that the jury may properly attach detrimental significance to the defendant's own testimony or evidence introduced on his behalf. We recently observed:

> We cannot speculate whether the jury assessment of Appellant's credibility may have tipped the balance. Assuming, arguendo, that it did, the jury could properly evaluate his testimony in a way that would strengthen the Government's case. . . . This is not to suggest that Appellant's testimony could be relied upon by the trial court, or by a reviewing court, in evaluating the sufficiency of the Government's case against a challenge by motion for a directed verdict of acquittal. To draw the homely analogy, evidence introduced by an accused

in his own defense cannot give life to a "dead horse," but it can invigorate a weak one.

*Thompson v. United States*, *supra* at [illegible] 408 F.2d at 1408.

Without assuming so, it is possible that the jury was unconvinced by Appellant's statements that the complaining witness was never in his car and that he never had relations consensual or not with her. He could not explain the presence of her gloves in his car and the expert testimony which linked fibers of his clothing with those found on the Complainant's garments. It is quite true that a defendant has the right to argue inconsistent defenses as Appellant did here, *see Whittaker v. United States*, 108 U.S. App. D.C. 268, 281 F.2d 631 (1960), and note 7 *supra*, this often represents a tactical decision to be made at trial. However, it would not be surprising if this position reflected unfavorably on Appellant's credibility and weighed against the jury's favorable consideration of the consent issue when they considered the totality of the evidence.

(3)

Appellant also claims that the Government suppressed certain relevant evidence. Appellate counsel argues that the prosecution failed to produce the piece of paper allegedly containing Appellant's name, or the name "Charles", and Appellant's phone number. As noted above, the prosecution readily admitted the loss of this paper in police custody and the jury was free to draw its own subtle inferences from this explanation. A set of battery cables allegedly recovered from Appellant's car at the time of his arrest were similarly claimed to have been suppressed. On this point, suffice it to say that defense counsel was made aware that the cables were possibly in police custody at the Eleventh Precinct. No effort was made to subpoena them pursuant to Rule 17 (c), Fed. R. Crim. P.

In his brief in this court Appellant's counsel also seeks to develop an issue from the Government's failure to call the husband of the complaining witness and then proceeds to

speculate that perhaps defense counsel might have developed from the husband some facts which would reflect that the complaining witness consented. In so doing counsel for Appellant makes wholly unjustifiable excursions totally beyond the record of this case. He relies on comments garnered in post-trial interviews with Appellant and his trial counsel, none of which are even remotely hinted at in the record.

We recently have had occasion to comment on the grave impropriety of trial counsel arguing facts which are not in evidence. Means are provided by rule to present newly discovered evidence. To go beyond these means and argue non-record facts is a gross breach of professional standards. It is elementary that in an appellate court counsel are not free to argue facts which have not been subjected to the rational tests of the adversary system. The bar should be on notice that the court will hereafter expect that non-record factual matter will not be alluded to in briefs or argument unless the appropriate tenders have been made in support of a motion to re-open the record in the District Court on the basis of newly discovered evidence. Rule 60(b), FED. R. APP. P.[8]

We have considered Appellant's other contentions of error and find in them no basis for disturbing the judgment of conviction.

*Affirmed.*

FAHY, *Senior Circuit Judge, dissenting:* This case was tried and decided in January of 1968. It was treated as a capital case, because the terms of the statute, 22 D.C. Code

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[8] A motion to strike the improper references was made by the Government prior to the argument of this appeal, but was held in abeyance pending oral argument. In accord with our present discussion, that motion will be granted and the non-record offending material will be regarded as stricken.

§ 2801, under which appellant was convicted, permitted the jury to add the death sentence to its verdict should it find him guilty. The trial judge so instructed the jury. While he advised the jury that the Government was not seeking the death penalty, he continued, "but you may, if you wish to do so, add the words, 'with the death penalty,' to your verdict of guilty, if you find him guilty."

On April 8, 1968, the Supreme Court decided *United States* v. *Jackson*, 390 U.S. 570. Thereafter, on December 13, 1968, this court in *Bailey* v. *United States* and *Humphries* v. *United States*, ___ U.S. App. D.C. ___, 405 F.2d 1352, held under the authority of *Jackson* that the death sentence provision of 22 D.C. Code § 2801 was unconstitutional. The court nevertheless affirmed. For the reasons set forth in my concurring and dissenting opinions in *Bailey* and *Humphries*, I would have reversed and remanded for a new trial with the statute limited as required by *Jackson*, precluding an instruction permitting the jury to add the death penalty to a verdict of guilty. For similar reasons I also dissented in *Duckett* v. *United States*, ___ U.S. App. D.C. ___, ___ F.2d ___. There I pointed out that the verdict of guilty was not compelled, as this court deemed the guilty verdict to be in *Springfield* v. *United States*, ___ U.S. App. D.C. ___, ___, 403 F.2d 572, 573, notwithstanding the erroneous death sentence instruction.

A review of the evidence of guilt in the present case does not at all indicate to me that the verdict of guilty was compelled, so as to lead us to hold that the choice of the death sentence at the hands of the jury had no influence upon their resolution of doubts by agreeing upon a guilty verdict but without the death sentence. The non-compelling character of the evidence is sufficiently shown by the court's opinion without need for further elaboration on my part. Indeed, the evidence raises other difficulties for me, but I need rest my dissent only on the ground stated.

I respectfully dissent.

IN
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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In The Matter Of

UNITED STATES OF AMERICA

v.

BARRINGTON JOSEPH JOHNSON

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App. No. 21851

Crim. No. 335-67

# PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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(Appointed by this Court)

August 4, 1969

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In The Matter Of

UNITED STATES OF AMERICA

v.

BARRINGTON JOSEPH JOHNSON

App. No. 21851

Crim. No. 335-67

# PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Barrington Joseph Johnson, appellant-defendant, through his court-appointed counsel in this case, petitions this court for rehearing and, for the reasons set forth below, respectfully suggests that a rehearing en banc is required.

## I. STATEMENT OF POINTS WHICH PETITIONER BELIEVES REHEARING AND RECONSIDERATION EN BANC.

A. The decision is in conflict with this court's decision in *Farrar v. U.S.*, 275 F.2d 868 and consideration by the full court is necessary to secure conformity of its decisions.

B. Appellant was prejudiced by the death sentence instruction since the verdict of guilty was not compelled.

C. The decision in this case misapprehends appellant's suppression of evidence argument and makes unjustified attack upon appellant's counsel.

## II. ARGUMENT.

Point A: *Conflict with Farrar*

By decision of June 20, 1969 in this case, this court affirmed appellant's conviction for rape. 22 D.C.

Code § 2801. The majority opinion (Judges Burger and McGowan, with Senior Circuit Judge Fahy dissenting) rejects appellant's contentions that (1) the Government failed to establish a prima facie case of lack of consent by the complaining witness and (2) even if the trial court did not err in failing to take the case from the jury and directing a verdict of acquittal, the evidence failed to show that complainant's acquiescence was the product of a substantial or reasonably based fear and, therefore, was insufficient to sustain the jury's verdict of guilty. In reaching its conclusion the decision holds that the consent issue in a rape case turns on the complainant's credibility—an issue "intended and . . . plainly suited—for jury determination. . . .". (Decision, pp. 7-8) which the court is powerless to disturb. The majority thus has viewed this appeal as tendering an issue of comparative credibility or as requesting this court to review and redetermine disputed issues of fact. Appellant respectfully submits that this is not the issue. Rather, the issue on this appeal is whether the Government made out a case of rape—an issue which Chief Judge Prettyman of this court in *Farrar v. United States*, 275 F.2d at 875 characterized as a question of law.

The conflict in approach between this decision and *Farrar* in this connection is best demonstrated by a comparison of the following language appearing in the respective opinions:

*Farrar.* (275 F.2d at p. 875)

"I do not see this case, as the petition for rehearing would have us do, as an evaluation of comparative credibility, or as an appellate redetermination of disputed issues of fact. My view is that upon the testimony of the complaining witness the Government did not make out a case of rape. This is a question of law."

*Opinion here* (pp. 7-8)

"The jury was properly allowed to consider and resolve the issue of the credibility of the key witnesses in deciding whether the Complainant's will had in fact been overborne. Of all the issues which are in the highest order for a jury one is hard pressed to suggest one more firmly suited for jury determination than that of credibility. We cannot say their verdict on this point

> was without reasonable foundation and whatever our own resolution might be were we to decide the fact issues—had we been the triers—this verdict was within the proper range of permissible alternatives for the finders of fact."

To the extent that the majority opinion here concludes that the issue is purely one of credibility, it represents a *pro tanto* adoption of the dissenting opinion of Judge Miller in *Farrar*. In his dissent, Judge Miller stated (275 F. 2d at 870):

> "When the testimony is reviewed objectively, it becomes apparent that the case turns on the credibility of the witnesses and not on the sufficiency of the evidence; that there was evidence sufficient to convict if the prosecution's witnesses are credited."

Thus, there is a conflict between this case and *Farrar* not only in terms of result but more important, in terms of this court's duty to assure that the Government has made a case *even if the prosecution testimony is fully credited*. Since the dissenting view of Judge Miller in *Farrar* has now apparently been adopted by the majority, there has been an about-face in the law of this circuit which merits en banc consideration.

The conflict with *Farrar* is not confined to a disagreement regarding the court's role upon review of a rape conviction. There is also a conflict with regard to the sufficiency of the evidence to convict where the complaining witness' testimony is fully credited. Chief Judge Prettyman in *Farrar* summarized the law of rape as follows (275 F. 2d at 876):

> "As I understand the law of rape, if no force is used and the girl in fact acquiesces, the acquiescence may nevertheless be deemed to be non-consent if it is induced by fear; but the fear, to be sufficient for this purpose, must be based upon something of substance; and furthermore, the fear must be of death or severe bodily harm. A girl cannot simply say 'I was scared', and thus transform an apparent consent into a legal non-consent which makes the man's act a capital offense. She must have a reasonable apprehension, as I understand the law, of something real; her fear must be not fanciful but substantial."

The foregoing quote cannot be reconciled with the majority decision in this case because appellant was convicted on the basis of the complainant's testimony that she was "scared to death because I really thought he was going to kill me?" The opinion concedes that the alleged fear "was not based on a discernible weapon or any other theory of fear which was incredible on the basis of her own testimony" and finds it enough that the alleged fear was based "*on a general fear of her assailant*" (page 5, emphasis in original). But here the court is supplying a rationale for complainant's conduct after the fact which finds no support in her testimony.[1] When pressed for the basis of her fear, she testified as follows: (pp. 117-118)

Q. What did you think was going to happen to you at the time?

A. I didn't know what was going to happen to me because I was scared to death.

Q. You were scared? Well, he didn't have a weapon, did he?

A. No, he did not.

Q. You didn't see a weapon, did you?

A. No.

Q. Then he wasn't threatening your with any weapon, was he?

A. No.

Q. When did it come to your mind that he might be thinking of sex?

A. When he told me to remove my underclothes.

Q. You mean before that you never had any idea he he was thinking of sex?

A. I don't know what he was thinking of. I thought he was going to kill me really.

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[1] Compare the majority's suggestion of a "general fear" with Judge Prettyman's opinion in Farrar (275 F.2d at p. 877) "although the law of rape may be elastic enough to permit easy speculations as to what might have frightened the girl in such a case,—e.g. she thought there was a knife although there was none—the record before us does not permit of such speculations . . . the rape penalty does not rest upon imaginary fears."

Q. How did you think he was going to kill you?
A. I don't know, I was just afraid.
Q. Why did you think he was going to kill you?
A. I just did.
Q. You didn't know him before did you?
A. No.
Q. He had no grudge against you, did he?
A. No.
Q. Let me ask you: Did he look strange or unusual?
A. No.
Q. Did he look drunk?
A. I don't know whether he was drunk or not.
Q. You don't know. But really up until the time he asked you to take your clothes off sex didn't enter your mind?
A. Everything entered by mind but I had no idea what he was going to do with me. No.

In the absence of a weapon, any suggestion of a weapon, force or physical violence, the answer "I was just afraid" falls far short of the requirements of *Farrar* that the fear "be based upon something of substance," . . . a reasonable apprehension . . . of something real; her fear must be not fanciful but substantial." (276 F. 2d at p. 876).

The sustantive conflict is clear: *Farrar* adopts an objective standard: the alleged fear must have a real, substantial basis. This decision adopts a subjective standard: the uncorroborated testimony of the complaining witness that she was "scared to death" without more, if credited by the jury, is enough to make out a case of rape.

The mischief inherent in abandoning the test of substantiality or some other meaningful standard by which the alleged fear may be tested is clear. So is the conflict with *Farrar*. What is to prevent any vindictive woman from claiming she submitted because of a "general fear" of a defendant? This is precisely the reason for the *Farrar* requirement that the alleged fear be shown to have some factual foundation. Since this decision removes the *Farrar* requirement that the expressed fear have some substantial basis, the law of rape has been changed, and the conflict is irreconcilable.

Appellant respectfully submits that the conflict is not resolved by inferring a "*general fear*" for reasons that the complaining witness did not herself express. Nor is it resolved by the majority's attempt to distinguish *Farrar* on its facts. The *Farrar* conviction was reversed because the expressed basis for the complainant's fear, i.e. that her "attacker" had a knife which she never saw was found incredible and "the conviction could not stand in the absence of any viable alternative cause for the prosecutrix' 'fear' of her attacker." (decision, p. 5) Here, there was no knife, no suggestion of a knife and no excuse indicated by the complainant for her complete acquiescence. Thus, this is a stronger case on the facts than *Farrar* because here *no* extrinsic reason appears for the expressed fear whereas in *Farrar*, complainant believed defendant had a knife (a reason which was rejected as incredible). In *Farrar*, at least an attempt was made to prove that consent was induced by fear having a reasonable basis. Here, there was none. This conflict between the *Farrar* rule and this case should be resolved by the entire circuit.[2]

Point B. Appellant was Prejudiced by the Death Sentence Instruction.

The dissent of Senior Circuit Judge Fahy notes that appellant was prejudiced by the trial judge's instruction to the jury that although the Government was not seeking the death penalty they might, if they found him guilty, recommend capital punishment. In view of the fact that the evidence in this case did not compel a guilty verdict, the jury might well have been influenced to render a guilty

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[2] In inferring a "general fear of her assailant" the opinion uses language which colors the issue to defendant's prejudice (if she consented, she was not "assailed") and ignores several undisputed facts in the complaining witness' testimony which tend to rule out any "general fear". These include the failure to scream, attempt escape or signal the station attendant when they stopped for gas (54-56); the fact that they drove around and talked and that she told him she did not love her husband before he laid a hand on her. (57, 111), and that she undressed herself at his request without any oral threats (59).

verdict without the death penalty not because they were convinced of appellant's guilty beyond a reasonable doubt but as a compromise between finding defendant "not guilty" and recommending capital punishment because they disbelieved appellant.

The majority opinion itself concedes that the evidence here did not compel a guilty verdict and characterizes the trial as a credibility battle (at pp. 7 and 8 of the decision).

> "Admittedly, the trial and this record is not a model of symmetrical components—but difficult criminal trials seldom are; this is inherent when none but victim and attacker are present. What does emerge from the record, however, is the critical importance of credibility on the key issue of consent."
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> * * * * *
>
> "We cannot say their verdict on this point was without reasonable foundation, and whatever our own resolution might be were we to decide the fact issues—had we been the triers—this verdict was within the proper range of permissible alternatives for the finders of fact."

The dissent of Senior Circuit Judge Fahy comments upon the non-compelling nature of the evidence of guilt as follows:

> "A review of the evidence of guilt in the present case does not at all indicate to me that the verdict of guilty was compelled, so as to lead us to hold that the choice of the death sentence at the hands of the jury had no influence upon their resolution of doubts by agreeing upon a guilty verdict but without the death sentence. The non-compelling character of the evidence is sufficiently shown by the court's opinion without need for further elaboration on my part. Indeed, the evidence raises other difficulties for me, but I need rest my dissent only on the ground stated."

At the very least, this case should be remanded for a new trial without the prejudicial instruction.

Point C: *The Unjustified Attack Upon Counsel.*

Commencing at the bottom of page 9 of the opinion, counsel is accused of seeking to develop an issue from the

Government's failure to call the husband of the complaining witness and making "wholly unjustified excursions totally beyond the record of this case." The majority even go so far as to suggest that counsel has committed a "gross breach of professional standards" (Opinion, pp. 9-10). It is ironic that this charge should be leveled at court-appointed counsel for conscientiously attempting to assist the court in the administration of its criminal docket. Counsel respectfully suggests that this personal attack is wholly inappropriate, unfair and unjustified. In response to the Government's motion to strike, counsel pointed out that Point IV of appellant's brief (the suppression of evidence argument) argues that the Government suppressed certain physical evidence in its possession consisting of (1) the battery cables located in appellant's car and (2) the document bearing appellant's name and phone number which admittedly was turned over to the police. This physical evidence —the existence of which is documented in the record—is the only evidence which appellant contends was wrongly suppressed. As regards the alleged attempt to "develop an issue from the Government's failure to call the husband of the complaining witness" and related accusations, counsel was not arguing non-record facts but was merely exercising an advocate's prerogative of drawing inferences from gaps in the Government's case. This argument was advanced not in support of the argument regarding the alleged suppression of evidence—which was based on the record—but rather to suggest a possible motive for the complainant's incredible story. All this was explained in appellant's reply to the motion to strike.[2a] If the court nevertheless felt the argument improper, it could have granted the Government's motion to strike without admonishing counsel and the bar at large. Counsel recalls that at the outset of the oral argument he was asked by Judge Burger whether he intended to rely upon any of the matter to which the motion to strike was addressed. The transcript of the oral argument will show that counsel answered

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[2a] Thus, appellant's reply to the motion to strike states at page 2 "The specific matter sought to be stricken is admittedly not in the trial record but is argument to suggest a possible motive for complainant's story."

"no" and that the matter was not used in oral argument. In these circumstances, the majority's discussion is not responsive to any point appellant relies upon and the amount of space devoted to it while other points raised on appeal were ignored is surprising.[3]

The court's language places court-appointed counsel in a quandary. On the one hand, the court insists that assigned counsel make all available arguments on behalf of an indigent appellant in prosecuting an appeal. But the majority here suggests that counsel should do less than this, by not drawing inferences from the Government's case and by not suggesting motives in a case that, the majority holds, turns on credibility. The court's language creates a dilemma for court-appointed counsel which should be clarified by a rehearing en banc. Certainly, this court is not unmindful that the administration of its criminal caseload requires the appointment of counsel who serve at considerable personal sacrifice. The cooperation and assistance of the bar required to make the system work is not fostered by the majority's language in this case.

## *CONCLUSION*

For the foregoing reasons, this case should be reheard en banc.

Respectfully submitted,
WILLIAM J. LIPPMAN
Attorney for Appellant
(Appointed by this court)

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August 4, 1969

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[3] For example, the opinion contains no discussion of appellant's arguments that appellant was prejudiced by the U.S. Attorney's closing arguments mischaracterizing the defense (Point III) or that the sentence of 6 to 18 years is excessive (Point V).

*CERTIFICATE OF SERVICE*

I certify that on this 4th day of August 1969 I caused to be served a copy of this document on the United States Attorney's Office.

WILLIAM J. LIPPMAN

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,851

BARRINGTON JOSEPH JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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Appeal from the United States District Court for the District of Columbia

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On Rehearing En Banc *

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Decided March 23, 1970

*Mr. William J. Lippman* (appointed by this court) for appellant.

*Mr. Daniel E. Toomey*, Assistant United States Attorney, with whom *Messrs. David G. Bress*, United States Attorney at the time the brief was filed, *Frank Q. Nebeker*, Assistant United States Attorney at the time the brief was filed, and

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* After the hearing and decision of this case by a division of the court, and upon the filing of a petition for rehearing by the division, the case was *sua sponte* placed *en banc*, but without further argument or briefing.

*Nicholas S. Yunzio*, Assistant United States Attorney, were on the brief, for appellee.

Before BAZELON, *Chief Judge*, and FAHY, *Senior Circuit Judge*, and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, and ROBB, *Circuit Judges*, sitting *en banc*.

PER CURIAM: This appeal comes to us following Appellant's District Court jury trial conviction for rape. 22 D.C. CODE § 2801. Appellant stresses the factually-oriented issue of consent and alleges the Government's failure to establish a prima facie case of lack of consent by the complaining witness.

I

At trial, the emphasis was on the conflicting testimony offered by the Complainant and Defendant on the issues of the actual physical act and consent thereto.

The complaining witness testified that she met Appellant at a gas station in the early morning hours when her car stopped as she proceeded to work at St. Elizabeths Hospital. Appellant offered to push her car the short distance to the Hospital parking lot, and after he did, he pulled her into his car and left the area. Complainant testified that she was "scared to death" but made no attempt to scream at this point. She testified that Appellant kept repeating that he would not hurt her if she did not scream. Appellant stopped at another gas station to purchase gasoline, and he placed his arm around her neck again telling her not to scream. The Complainant, who at that time suffered from a hyperthyroid condition, testified that the pressure of the Appellant's arm against her thyroid gland made it more difficult for her to breathe. He thereupon drove to a deserted street saying that there was "no use screaming because no one would hear"; it was here that the attack took place. As to her mental and emotional state at the time, she related that: "[D]uring the whole time, I was scared to death because I really thought he was going to kill me. I never

thought he would take me back to work." She did not cry out, although she testified that she kept begging him to take her back to work.

Thereafter, appellant drove her back to St. Elizabeths Hospital. Complainant testified that she then, at the appellant's demand, gave him her car keys and took from him a piece of paper containing his phone number and the name "Charles." Next she went into the hospital to report the incident to her supervisor and to the police who were summoned to the scene.[1] An examination was made at D.C. General Hospital. That afternoon she was returned to St. Elizabeths parking lot to identify Appellant who had returned to the lot in the same car that she had described that morning.[2]

To corroborate Complainant's testimony the Government called the director of the pathological department of D.C. General Hospital whose testimony confirmed recent relations; an FBI specialist in the microscopic examination of fibers and textile materials testified that he found numerous woolen fibers on Complainant's clothing having the same characteristics as the fibers of the sweater Appellant was wearing at the time of the attack.

The principal thrust of Appellant's case at trial was that although he admitted meeting the Complainant, pushing her car, and returning to the Hospital parking lot to help her start it that afternoon, she had never been in his car and he had no contact with her.[3]

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[1] On the return to the Hospital Appellant said that he would return to St. Elizabeths that afternoon to help her start her car but he thought she would "probably have policemen everywhere"; she replied that she would not.

[2] At the time of his arrest, Appellant had Complainant's car keys in his possession. The Complainant also identified as hers a pair of white gloves found in Appellant's car at the time of his arrest.

[3] In his closing argument, trial counsel for Appellant argued

Appellant admitted having Complainant's car keys at the time of his arrest but said that she had given them to him so that he could return to start her car. He also testified that he could not recall whether Complainant was wearing gloves that morning, and he had no recollection how her white gloves had come to be in his car at the time of his arrest.

II

As noted above, the focus of Appellant's case on appeal is his assertion that the Government failed to establish a prima facie case of lack of consent by the complaining witness. As an alternative to this proposition, he also contends that even if the trial court did not err in failing to take the case from the jury and directing a verdict of acquittal, the evidence in its totality was clearly insufficient to sustain the jury's verdict of guilty.

Before the Appellant can effectively challenge the trial court's decision to send this case to the jury, he must establish that at the point when the motion for acquittal was made the Government had not introduced

> such evidence that reasonable persons *could* find guilt beyond reasonable doubt. It is not a requirement that the evidence *compel*, but only that it is capable of or sufficient to persuade the jury to reach a verdict of guilt by the requisite standard.

*Crawford v. United States*, 126 U.S. App. D.C. 156, 158, 375 F.2d 332, 334 (1967) (emphasis in original); *accord*,

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both the absence of any sexual encounter and the issue of non-consent:

> One more thing: I'm going to argue consent, and I'm going to argue consent because, of course, there is evidence of it, but I don't concede one second that the act of intercourse took place, I want you to understand that. The defendant has this right.

*e.g.*: *Thompson v. United States*, 132 U.S. App. D.C. 38, 405 F.2d 1106 (1968); *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

In challenging the validity of the trial court's determination, Appellant presents a staccato list of points which are said to militate against a finding of non-consent. Among those offered are the Complainant's failure to forcefully resist, her failure to scream out or attempt escape, the fact that she removed her own clothing, the absence of any weapon, and the fact that the appellant later returned to the hospital parking lot to help her start her car. Indeed, like many records in rape cases, the evidence is not always clear-cut. Nevertheless, the evidence presented in the Complainant's testimony was not in itself incredible as was that of the complaining witness in *Farrar v. United States*, 107 U.S. App. D.C. 204, 275 F.2d 868 (1960), a case upon which Appellant places great reliance.

In denying the Government's petition for rehearing *en banc* in *Farrar* and thereby preserving this court's earlier reversal of a conviction for rape, then Chief Judge Prettyman explained that acquiescence may be deemed non-consensual in the absence of force if the victim is put in genuine apprehension of death or bodily harm. The determinative factor in *Farrar* was that "[t]he complaining witness rested her claim of fear upon a simple physical fact—a knife." *Id.* at 212, 275 F.2d at 876. "The only basis for fear advanced by the prosecutrix was the knife; she suggested no alternative cause for fear." *Id.* at 213, 275 F.2d at 877. When this court found it incredible that the complainant had been coerced by a knife for a two or three hour period and had "submitted" to multiple acts of intercourse, and yet never saw the knife, the conviction could not stand in the absence of any viable alternative cause for the prosecutrix' "fear" of her attacker. Indeed, the sitting division in *Farrar* found that her participation in the acts of inter-

course were not induced by threats or "by words of any sort," *Id.* at 204, 275 F.2d at 868.[4]

In the instant case, the Complainant's relation that she was "scared to death because I really thought he was going to kill me" was not based on a nondiscoverable weapon or any other theory of fear which was incredible on the basis of her own testimony. It was based on a *general fear of her assailant* who had dragged her from her car, kept his arm around her neck when they stopped for gas, drove her to a deserted location, and told her it would be useless for her to scream because no one would hear. The appellant was not unaware of complainant's fright; she testified that he had "said that he knew I was scared because I was so nervous." In these circumstances, this court's observations in *Ewing v. United States*, 77 U.S. App. D.C. 14, 16, 135 F.2d 633, 635 (1942), *cert. denied*, 318 U.S. 776 (1943) (emphasis added), are worth reiterating:

> There are cases, especially older ones from other jurisdictions, which seem to require resistance to the victim's ultimate physical powers in order to sustain conviction for this crime. But the law is no longer in this last-ditch stage. Whatever it may have been in other times, it is generally settled now that *consent is not shown when the evidence discloses resistance is overcome by threats which put the woman in fear of death or grave bodily harm*, or by these combined with some degree of physical force.

Therefore, despite Appellant's protestations of "an insur-

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[4] Other facts which bore on the credibility of the complaining witness' testimony in *Farrar* also distinguish it from this case. In *Farrar* the girl was accosted on a public street and walked two or three blocks to her assailant's room; both the street and room were lighted, thereby facilitating her observation of any weapon she thought he had; the incident stretched over a two to three hour period during which time her assailant left her alone in his room.

mountable evidentiary gap on the consent issue," we feel that the trial judge correctly viewed the evidence as such "that a reasonable mind might fairly have a reasonable doubt *or might not* have such doubt" on the question of consent. *Crawford, supra* at 158, 375 F.2d at 334 (emphasis in original). The District Judge was required to view the evidence at the close of the Government's case in the light most favorable to the Government's position.[5] Having made this determination based on testimony which was not inherently incredible, the case was for the trier and not the trial judge, and the motion for directed verdict of acquittal was properly denied.

Appellant's contention that the totality of the evidence adduced at trial was insufficient to sustain the jury's verdict is also unavailing. Appellate counsel makes a concerted attack on the credibility of the Complainant, pointing out various specific inconsistencies between her testimony and that of other witnesses,[6] and even raises a "number of nagging questions" concerning certain witnesses who were not called by the prosecution *or defense*.[7] Admittedly, the

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[5] *See* Thompson v. United States, *supra;* Crawford, *supra;* Thomas v. United States, 93 U.S. App. D.C. 392, 211 F.2d 45, *cert. denied*, 347 U.S. 969 (1954); Curley, *supra.*

[6] Examples are: her statement that Appellant arrived at the gasoline station after she did as contradicted by the attendant's relation of the sequence of arrivals; her denial that she asked for leave when she arrived at the supervisor's office as contrasted with the supervisor's recollection to the contrary; her testimony that the crime took place on the front seat of Appellant's car whereas the expert witness was unable to find any strands of thread matching her clothing on the seat.

[7] Examples include the Government's failure to call the Complainant's husband or the attendant from the second gas station where Appellant stopped when she was in the car. However, there is no indication that these witnesses were not equally available to the defense. See pp. 9-10 *infra.*

trial and this record is not a model of symmetrical components—but difficult criminal trials seldom are; this is inherent when none but victim and attacker are present. What does emerge from the record, however, is the critical importance of credibility on the key issue of consent. Present counsel recognizes this reality by conceding that the consent issue focused on the Complainant's credibility; he argues:

> The only evidence to rebut the strong inference of consent . . . is the complaining witnesses's . . . . *Obviously, the jury believed the testimony.* Equally obviously, however, the jury should not have believed her testimony because (1) her alleged fear was not shown to have a reasonable basis and (2) her story was inherently incredible, i.e. inconsistent with other testimony and contradicted by human experience.

Brief for Appellant at 19 (emphasis added).

We do not agree that the circumstances which surrounded her abduction, the isolated locale of the actual attack, and the threats of her attacker were an insufficient basis for reasonable fear if the victim's testimony is credited. Nor can we agree that her testimony was inherently incredible. The jury was properly allowed to consider and resolve the issue of the credibility of the key witnesses in deciding whether the Complainant's will had in fact been overborne. Of all the issues which are in the highest order for a jury one is hard pressed to suggest one more firmly intended and more plainly suited for jury determination than that of credibility. We cannot say their verdict on this point was without reasonable foundation, and whatever our own resolution might be were we to decide the fact issues—had we been the triers—this verdict was within the proper range of permissible alternatives for the finders of fact.

Testimony reduced to the printed words can have the appearance of truth when not one of those who saw and heard the witness believed him; to the contrary a printed

version which may arouse skepticism in the reader can reflect testimony which, to those who heard it, was filled with the clear ring of truth and hence believed. It is a rare case indeed, when twelve jurors *believe* and the trial judge who also saw and heard, fails to exercise his power to set the verdict aside, that an appellate court ought to intervene. That authority is a reserve power to be used only to prevent manifest injustice. This record, viewed as a whole as the jurors viewed it in no sense suggests any miscarriage of justice.

As we noted in *Crawford, supra*, the standard for the jury's determination of guilt beyond a reasonable doubt is stricter than the test to be applied by the trial court in determining whether a case may go to the jury at all. But when evaluating the basis of the jury's resolution of the issue of guilt, we must remember that the jury may properly attach detrimental significance to the defendant's own testimony or evidence introduced on his behalf. We recently observed:

> We cannot speculate whether the jury assessment of Appellant's credibility may have tipped the balance. Assuming, arguendo, that it did, the jury could properly evaluate his testimony in a way that would strengthen the Government's case. . . . This is not to suggest that Appellant's testimony could be relied upon by the trial court, or by a reviewing court, in evaluating the sufficiency of the Government's case against a challenge by motion for a directed verdict of acquittal. To draw the homely analogy, evidence introduced by an accused in his own defense cannot give life to a dead horse, but it can invigorate a weak one.

*Thompson v. United States, supra* at 39-40, 405 F.2d at 1108.

Without assuming so, it is possible that the jury was unconvinced by Appellant's statements that the complaining witness was never in his car and that he never had relations—consensual or not—with her. He could not explain the presence of her gloves in his car and the expert testi-

mony which linked fibers of his clothing with those found on the Complainant's garments. It is quite true that a defendant has the right to argue inconsistent defenses as Appellant did here, *see Whittaker v. United States*, 108 U.S. App. D.C. 268, 281 F.2d 631 (1960), and note 2 *supra*; this often represents a tactical decision to be made at trial. However, it would not be surprising if this position reflected unfavorably on Appellant's credibility and weighed against the jury's favorable consideration of the consent issue when they considered the totality of the evidence.

III

Appellant also claims that the Government suppressed certain relevant evidence. Appellate counsel argues that the prosecution failed to produce the piece of paper allegedly containing Appellant's name, or the name "Charles", and Appellant's phone number. As noted above, the prosecution readily admitted the loss of this paper in police custody and the jury was free to draw its own subtle inferences from this explanation. A set of battery cables allegedly recovered from Appellant's car at the time of his arrest were similarly claimed to have been suppressed. On this point, suffice it to say that defense counsel was made aware that the cables were possibly in police custody at the Eleventh Precinct. No effort was made to subpoena them pursuant to Rule 17 (c), FED. R. CRIM. P.[8]

We have considered Appellant's other contentions of error and find in them no basis for disturbing the judgment of conviction.

*Affirmed.*

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[8] The panel which heard this case in the first instance commented adversely upon the inclusion in appellant's brief on appeal of matter outside the record, and granted appellee's motion to strike the offending matter. We adhere to that disposition for the reasons advanced by the panel in its opinion.

FAHY, *Senior Circuit Judge*, with whom BAZELON, *Chief Judge*, and WRIGHT, *Circuit Judge*, *join*, *dissenting*. ROBINSON, *Circuit Judge*, *joining* in Part I of this dissenting opinion, would reverse on the ground that the evidence was insufficient to sustain appellant's conviction.

Appellant has been convicted and sentenced to serve six to eighteen years in prison for rape, a crime I am convinced has not been proved as the law requires, either by the evidence or as free of reversible error due to the case having been tried as though rape were a capital crime.

I.

Appellant's conviction rests upon the testimony of the complaining witness, not significantly strengthened by the testimony of others. She testified that she was a nurse at St. Elizabeths Hospital. Driving to her work there one morning about 6 a.m. her car became disabled near a gas station. She went to a telephone booth and called her husband. At about the same time appellant drove into the same station and offered her his help, which she accepted. With his car he pushed her car with her in it to a parking place on the grounds of St. Elizabeths near the building where she worked. As she was getting out of her car appellant went over to it and pushed her back in, telling her to move over so he could come in on the same seat.[1] She pointed out

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[1] On cross-examination the complaining witness responded to questioning about this as follows:

Q. Now, what did you say, if anything, when he pushed you back in?

A. I don't remember saying anything.

She repeated this. Then this occurred:

A. He told me to move over.

Q. What did you say in response to that, if anything?

A. I said I couldn't move over.

the "console" barrier which prevented this. He then took hold of her arm and pulled her into his car. There was no outcry, no word of protest, no word or act of resistance.[2] Still holding her arm he drove off to a service station telling her on the way that she would not be hurt if she did not scream.[3] He stopped at a nearby gas station and there put his arm around her neck. The gas station attendant came right up to the car window. Appellant took money out of his pocket and paid through the window. Her mouth was free; only his arm was around her neck. No protest. No resistance. No word uttered or sign made. He drove off again to a secluded spot. On the way he told her where he worked and lived. Also during the ride he told her to take off her underclothes. No word of protest.[4] When they had stopped at the scene of the alleged crime he again told her that there would be no use in screaming and continued to converse with her. Responding to his questions, she told him she was married and had three children, but that she

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[2] On cross-examination she answered defense counsel's inquiries as follows:

Q. Did you scream at any time from the time he took you from your car to his?

A. No I didn't.

Q. Did you make any noise?

A. No I didn't.

[3] She also testified that "he said that he knew I was scared because I was so nervous" and that she explained her condition to appellant as follows: "I told him I had a thyroid condition and this made me nervous anyway."

[4] On cross-examination the complaining witness explained:

Q. Well, when he first asked you to take your underclothes off, what did you tell him, if anything?

A. I didn't say anything.

Q. You didn't say anything. You pretended like you didn't hear him?

A. I just didn't say anything.

did not love her husband. He again told her to take off her underclothes and she complied. No word of protest. No importunity. No force.

He drove her back to her place of work. He told her he would come back at three o'clock to start her car for her but she would probably have policemen. She said, "No, I wouldn't." He then asked her for the key to her car. She took it off the key ring and gave it to him. He asked her for a piece of paper to write on, which she gave him out of her purse. He wrote on it his correct phone number and a name—Charles—not his own, and gave it to her. She told him her name was "Luella." He did return as he said he would, with battery cables to help get her car started, and was arrested.[6]

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[5] She testified as follows on cross-examination:

Q. . . . Now, at any time during this entire time, did you ever tell him no?

A. No what?

Q. That you didn't want to do this, whatever he was going to do?

A. No, I only kept begging him to take me back to work.

Q. That's all. And you never said no; you never tried to stop him; you never put your hand up; and you never cried out. Is that correct?

A. He had told me if I wouldn't scream, he wouldn't hurt me.

[6] She testified that she went immediately to her supervisor to report the incident; however the testimony of her supervisor places her arrival in a different light. She testified that when the complaining witness arrived she was emotionally upset and asked for time off, explaining that she didn't feel that she could perform her duties. Later, in a private inner room, when the supervisor asked her what had happened and why she was late and thought she needed the day off she explained about being "accosted."

The crime of rape insofar as applicable to this case is defined in our Code as follows:

> * * * carnal knowledge of a female forcibly and against her will * * *

22 D.C. Code § 280f.

Clearly no "forcibly" carnal knowledge occurred—no force at all as the term is used in the context of a rape statute. Perhaps persuasion or seduction, or possibly coercion. But no "forcibly" carnal knowledge.

The testimony regarding force is that appellant pushed the complaining witness into her car at St. Elizabeths,[7] that he held her arm on the way to the gas station, and there put his arm around her neck. No further description of this conduct is given, and, moreover, these incidents were remote in time and place from the carnal knowledge, and of course do not constitute carnal knowledge forcibly or against her will. Even if her evidence shows that in a sense in the end she might have acted "against her will" it does not show that her submission was also "forcibly" imposed upon her, as required by our Code.

In the above situation the Government advances the principle that the law has engrafted upon the statutory definition of rape a substitute for "forcibly and against her will," namely, fear of death or serious bodily harm. This is a recognized substitute. *Farrar v. United States*, 107 U.S. App. D.C. 204, 211, 275 F.2d 868, 875 (1960) (Mem. of Chief Judge Prettyman on denial of rehearing en banc). But equally well recognized is the corollary that this fear, being as it is a substitute for "forcibly and against her will," must be proved by objective conduct which shows a substantive reason for fear of death or serious bodily harm. This is missing in this case. We have simply her own tes-

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[7] There is no testimony he "dragged her from her car", stated in the majority opinion.

timony long afterwards that she was "scared to death because I really thought he was going to kill me." This expression at trial of her subjective thought or feeling is not the substitute recognized by the law for "forcibly and against her will." The fear must reside in objective conduct proved by evidence adduced before the jury. On the issue of proof beyond a reasonable doubt that she feared death or serious bodily harm the conduct of appellant, as she described it, must be judged by her reaction to it at the time, which we have described, and by its character considered alone. Considered in this way the evidence points to no conduct which created fear of death or serious bodily harm, much less proof of it beyond a reasonable doubt. Her later testimony of her mere subjective feeling is insufficient to establish such conduct.

The statement that he said if she did not scream she would not be hurt loses all possible support for finding she feared for her life or serious bodily harm when she offered no resistance by either word or action and by no word even, much less action, sought to dissuade him. To permit the jury to read into her testimony a basis for such fear, inconsistent with his actual conduct shown by her testimony, and equally if not more importantly, inconsistent with her own contemporaneous reaction to his conduct, is to permit a conviction without support in law, and calls upon the court to assume responsibility for setting it aside.

The case requires a distinction to be drawn between a result which turns upon the credibility of the complaining witness and, accepting her credibility, the sufficiency of the evidence to establish the crime charged. *See Farrar, supra*, 107 U.S. App. D.C. at 211, 275 F.2d at 875. This distinction, especially important in a charge of rape alleged to have been committed with no evidence of objective conduct to support its essential ingredient of force or fear of death or serious bodily harm, is overlooked by the court. Its de-

cision is reached by acceptance of the credibility of the complaining witness. Accepting such credibility, however, as we have done as to what she says occurred, leaves proof of the crime lacking. More was owed to herself and to the law than appears from the evidence to support a conviction of rape, and the conviction properly can stand only upon evidence in the record.

II.

Upon the above analysis I think appellant is entitled to reversal and dismissal of the indictment. Assuming, however, that the court is justified in its disagreement with this position, then in any event I think he is entitled to a new trial because the jury was erroneously permitted to consider the case as one in which the death sentence was permissible. At the beginning it was impressed upon the jury that this was a capital case, and again when the court so charged the jury as the trial was ending. The jury was deliberately chosen only from among those willing to attach the death penalty in case of a verdict of guilty,[8] and the

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[8] During the voir dire examination the prosecuting attorney explained to the panel of prospective jurors: "This is a criminal case. It is a capital case." Again, still during the voir dire, he repeated: "Ladies and gentlemen, this is a capital case. The Government is not asking for the death penalty, in this case, however . . . . My attempt is to question the jury concerning, number one, are you opposed to capital punishment? If you are opposed to capital punishment, would this preclude or prevent you from returning a verdict of guilty if the evidence so showed guilt if you were selected as a member of the panel to try this case?

"Let me repeat it: I am asking you whether you are for or against capital; the question is if you are against capital punishment, would this prevent you from returning a verdict of guilty if you were selected as a juror in this case?

"The reason I ask the question is because the Court at the end of the case will instruct you that you can return a ver-

court charged the jury that although the Government was not seeking the death penalty, "you may, if you wish to do so, add the words, 'with the death penalty,' to your verdict of guilty, if you find him guilty."

We know now, due to the subsequent decision of the Supreme Court in *United States v. Jackson*, 390 U.S. 570 (1968), that this was error; that the death provision in our rape statute, like the similar provision in the kidnapping statute involved in *Jackson*, derogated in an unconstitutional manner from an accused's right to trial by jury. After *Jackson* we so held in *Bailey v. United States* and *Humphries v. United States*, 432 U.S. App. D.C. 82, 405 F.2d 1352 (1968). Concededly, therefore, it was error in the present case to compose the jury as though this were a capital case, and, also, to instruct the jury that it was. Nevertheless our court treats as harmless such a serious error because the jury did not add the death sentence to the verdict of guilty.

Over my dissent a division of this court took the same position in *Bailey & Humphries, supra*, saying there, "no reasonable possibility of prejudice existed to appellants by

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dict of guilty with the recommendation of the death penalty.

"My question is whether this would prevent you from returning a verdict of guilty, assuming that you are against capital punishment, and that this would prevent you from returning a verdict of guilty and guilty alone? Is there any such juror present?"

One juror Mrs. Johnnie M. Lyles answered: "Yes, it would if I thought the penalty would be death." Asked then by the prosecuting attorney if the jury could not decide on the penalty but just as to guilt or innocence would this prevent her from returning a verdict of guilty. She said it would. A little later she said: "You say if I felt that he was guilty, would I say not guilty if I thought he would get the death penalty?" The prosecuting attorney said: "That is correct." And she said: "Yes, that is what I said."

reason of the jury being instructed that the statute permitted them to impose the death penalty." 132 U.S. App. D.C. at 87, 405 F.2d at 1357. I also dissented from a similar ruling in *Duckett v. United States*, ——— U.S. App. D.C. ———, 410 F.2d 1004, 1005 (1969). And *see Springfield v. United States*, 131 U.S. App. D.C. 166, 403 F.2d 572 (1968), where the conviction was upheld but where the court pointed out that the evidence of guilt was so strong that the verdict was compelled. Clearly that view cannot absolve the error of prejudice in the present case.

That it is reversible error to try a defendant for a more serious offense than one for which he is validly triable was pointed out in an opinion by Mr. Justice Fortas, in which Chief Justice Warren and Mr. Justice Douglas joined, in *Cichos v. Indiana*, 385 U.S. 76, 80 (1966). Though a dissenting opinion the majority of the Court cannot be said to have been in disagreement, since they disposed of the case on another ground, as I explained in *Bailey* and *Humphries*, *supra*, 132 U.S. App. D.C. at 90, 405 F.2d at 1360. The Fortas opinion states the matter as follows:

> First, it exposed [defendant] to the hazards of prosecution and conviction for the more onerous offense. Second, it again gave the prosecution the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (C.A.2d Cir. 1965), cert. denied, 383 U.S. 913 (1966).

*Cichos*, *supra*, 385 U.S. at 81.

In the *Wilkins* case referred to, Circuit Judge Marshall, now Mr. Justice Marshall, wrote the opinion. An instruction on first degree murder was given the jury in a case in which it was held the accused was not then triable for a crime more serious than second degree murder. The verdict was guilty of the latter; nevertheless the Court stated:

> [I]t is entirely possible that without the inclusion of the first degree murder charge, the jury reflecting a not unfamiliar desire to compromise might have returned a guilty verdict on the first degree manslaughter charge on the same evidence. There is, of course, no basis for predicting with any confidence, that this would have been the outcome of the third trial if Hetenyi had not been reprosecuted for first degree murder; but neither is there any basis for predicting, with any confidence, that this would not have been the outcome. To make this latter prediction on the basis of the sufficiency of the evidence would be to ignore reality and, in effect, to have judges make the choice entrusted to the jury.

*Wilkins, supra*, 348 F.2d at 866.

I find no answer to this reasoning. The prosecution here obtained a jury willing to add the death sentence to a guilty verdict. No prospective juror not willing to attach the death sentence was accepted. The case was described by prosecutor and court as capital. While the Government did not request the death sentence neither did the Government disavow it or request that it not be added.

We cannot surmise there was no likelihood of the jury considering the availability to them of the death sentence. We have no basis for such a surmise; and it is the erroneous availability of the death sentence, not the likelihood of its rendition, that gives rise to the prejudice. It may have exerted an undiscernible influence on jurors in deciding whether to find guilt, but without the death sentence, or not guilty. One or more jurors, with his or her attitude about the crime of rape reinforced by the statutory provision for a death sentence, might have been so influenced. As stated by the Second Circuit in *Wilkins, supra*, 348 F.2d at 866, it is sufficient if there is "a reasonable possibility" of prejudice.

For the court erroneously to give the jury a range of verdicts more severe than the law allows in the case on

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,851

BARRINGTON JOSEPH JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

ON RECONSIDERATION EN BANC

Before: Bazelon, Chief Judge, and Fahy, Senior Circuit Judge, and Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon and Robb, Circuit Judges, sitting *en banc*.

*JUDGMENT*

This case came on to be reconsidered by the Court *en banc* on the record on appeal from the United States District Court for the District of Columbia, and on appellant's petition for rehearing and suggestion for rehearing *en banc*.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court *en banc* that the judgment of the District Court appealed from in this case is hereby affirmed.

Per Curiam
For the Court:
Nathan J. Paulson
Clerk

Dated: March 23, 1970.

Opinion per curiam.

Separate dissenting opinion by Senior Circuit Judge Fahy, with whom Chief Judge Bazelon and Circuit Judge Wright join. Circuit Judge Robinson joins in part 1 of the dissenting opinion and would reverse on the ground that the evidence was insufficient to sustain appellant's conviction.

# Supreme Court of the United States

No. 5247 ——, October Term, 1970

BARRINGTON JOSEPH JOHNSON,

*Petitioner,*

v.

UNITED STATES

*On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.*

*On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.*

October 19, 1970

The Chief Justice took no part in the consideration or decision of this motion and petition.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 5247

BARRINGTON JOSEPH JOHNSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR PETITIONER

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January 21, 1971

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 5247

BARRINGTON JOSEPH JOHNSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

# BRIEF FOR PETITIONER

## OPINIONS BELOW

The first Opinion of the United States Court of Appeals for the District of Columbia Circuit (A. 306) is not reported. The second Opinion of the United States Court of Appeals for the District of Columbia Circuit on Rehearing En Banc (A. 328) is reported at ___ U.S. App. D.C. ___, 426 F.2d 651 (1970).

## JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 23, 1970 (A. 348). The Petition for Writ of Certiorari was filed by petitioner, *pro se*, on May 18, 1970 after this Court granted petitioner's request for an extension of time within which to file such Petition. The Petition, together with the Motion for Leave to Proceed in Forma Pauperis were granted on October 19, 1970 ___U.S.___; 91 S. Ct. 107 (A. 349). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether prejudicial error resulted from petitioner's conviction for the crime of rape under the provisions of 22 D.C. Code 2801 where:

   (a) an unconstitutional death sentence instruction was given to the jury (and, in other respects, this non-capital case was tried as a capital case);

   (b) the guilty verdict might have been a compromise resulting from the jury's consideration of (a) above, and

   (c) the evidence of guilt was not compelling.

2. Whether, in any event, the evidence of guilt was sufficient to sustain petitioner's rape conviction under the provisions of 22 D.C. Code 2801.

3. Whether prejudicial error resulted from the prosecutor's closing arguments commenting unfairly upon petitioner's permissible alternative defenses (i.e., (a) that no act of intercourse took place and (b) that even if the evidence established that an act of intercourse took place, the prosecution did not carry its burden of proving lack of consent.)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

22 D.C. Code § 2801:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as pro-

vided in this section. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 808; Apr. 19, 1920, 41 Stat. 567, ch. 153; Jan. 30, 1925, 43 Stat. 798, ch. 115, § 1.)

## STATEMENT OF THE CASE

On January 22, 1968, following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of rape, 22 D.C. Code 2801. At the time of trial, the rape statute provided that the jury could impose capital punishment for rape if it found the defendant guilty. The Government did not seek the death penalty. Nevertheless, the case was tried as a capital case. The jury was chosen only from those willing to impose the death penalty in case of a guilty verdict (A. 13, 18). The Court charged the jury that they could sentence petitioner to death and that if they were unable to agree on the death penalty they should merely return a verdict of guilty (A. 298). On February 23, 1968, petitioner was sentenced to a period of imprisonment of from six to eighteen years.

Petitioner appealed to the Court of Appeals for the District of Columbia which, on June 20, 1969, affirmed his conviction two to one, Senior Judge Fahy dissenting. On August 4, 1969, petitioner filed with the Court of Appeals a Petition for Hearing and Suggestion for Rehearing En Banc (A. 317). The Court of Appeals entered an order assigning the case for rehearing en banc but without further argument and briefing, and on March 23, 1970 entered its Opinion on Rehearing En Banc affirming petitioner's conviction (A. 328). Four of the Judges on the Court of Appeals dissented on the ground that the evidence was insufficient to sustain petitioner's conviction and three dissented on the separate ground that the death sentence instruction was prejudicial error, citing *United States v. Jackson*, 390 U.S. 570 (1968).

Following the opinion of the Court of Appeals on Rehearing En Banc, petitioner filed a Petition for Certiorari, *pro se*, on May 18, 1970 (after this Court had granted petitioner's request for an extension of time). The petition for certiorari, together with the Motion For Leave to Proceed in Forma Pauperis, were granted on October 19, 1970 (A. 349). This, then, is a direct appeal from petitioner's conviction for rape.

Petitioner's conviction rests upon the testimony of the complaining witness (Mrs. Louella Mayes) not significantly strengthened by the testimony of others. The complaining witness was employed as a nurse at St. Elizabeth's Hospital. She was on her way to work between the hours of 6:00 and 7:00 a.m. on the morning of January 22, 1967 when her car became disabled near a gas station. Petitioner drove into the same station and was asked by the attendant to assist the complaining witness by pushing her car with his car to a parking place on the grounds of St. Elizabeth's near the building where she worked. He did so. The complaining witness testified that as she was getting out of her car, petitioner attempted to push her back, telling her to move over. When she replied that she was unable to move over because of the "console" barrier, she testified that petitioner pulled her from her car into his car (A. 28). There was no outcry, no word of protest or act of resistance. The complaining witness testified further that they drove off in petitioner's car; that petitioner told her that she would not be hurt if she did not scream; that they stopped at a service station where petitioner bought some gas, where she made no outcry, sought no help and offered no protest or uttered no sign to attract the attention or assistance of the gas station attendant (A. 29, 55, 58); that they left the gas station and drove to a secluded spot; that petitioner made no advances until after they had talked for a while and she told petitioner that she did not love her husband (A. 30, 60). She removed her underclothes without resisting when requested to do so and did not ask petitioner to stop.

The complaining witness also testified that petitioner drove her back to St. Elizabeth's where she made no effort to cry out, call the police or have petitioner apprehended. He offered to return that afternoon with battery cables to help start her car and she gave him her car keys. He gave her his correct phone number and a name – Charles – which was written on a piece of paper supplied by the complaining witness. She testified that she went immediately to her supervisor to report the incident (A. 33, 68), but her supervisor testified that when she arrived she asked for the day off because she did not feel that she could perform her duties and only later did she report being "accosted" (A. 174-175). Petitioner returned that same afternoon to the parking lot, with battery cables, as promised, and was promptly arrested and charged with rape. He freely admitted to police officers that he had pushed the complaining witness' car that morning and that he had returned to help start it.

At the trial, petitioner took the stand in his own defense and denied that sexual intercourse took place (A. 206). Issue was joined both as to whether intercourse had taken place and as to whether the prosecution had made out a prima facie case of lack of consent. In his closing arguments to the jury, the prosecutor ridiculed petitioner's position as follows: "Again he says there was no crime, and if she was raped, it was consent, and if it was consent, regardless, his man didn't do it." (A. 263).

## SUMMARY OF ARGUMENT

*United States v. Jackson*, 390 U.S. 570 (1968) held the death sentence provision of the Federal Kidnaping Act unconstitutional. In reaching its decision in *Jackson*, this Court cited with approval a decision of the Supreme Court of Nevada which held unconstitutional the death penalty provision of the Nevada rape statute (*Spillers v. State*, 84 Nev. 23 436 2d 18 (1968)). The death penalty

provision of the D.C. rape statute is subject to the same infirmities as those considered in *Jackson* and *Spillers* and is likewise unconstitutional. The Court of Appeals for the District of Columbia so held in *Bailey v. United States*, 132 U.S. App D.C. 82, 405 F.2d 1352 (1968).

The trial of this non-capital case as a capital case infected petitioner's trial to his prejudice. The unconstitutional death sentence instruction gave the jury a choice of three verdicts: (1) not guilty; (2) guilty as charged; and (3) guilty with the death penalty and created the possibility that in finding petitioner "guilty as charged" the jury rendered a compromise verdict. This possibility was enhanced by the non-compelling evidence of guilt. Four of the nine judges on the Court of Appeals for the District of Columbia dissented on the ground that the evidence was insufficient to sustain petitioner's conviction. The error in giving the death sentence instruction was not harmless because it was constitutional error and not "harmless beyond a reasonable doubt." *Chapman v. State of California*, 386 U.S. 18 (1967). It strikes at the heart of the guilt-determining process.

The dissenting opinion below reasons that the guilty verdict here might have been a compromise resulting from consideration by the jury of the impermissible death sentence charge. This rationale has since been adopted by this Court in *Price v. Georgia*, 398 U.S. 323, 331 (1970). Although a double jeopardy case, the rationale of *Price* is indistinguishable from this case. Whatever the factual context, the legal damage is done when the jury is given an impermissible option to consider and thereby an opportunity to reach a compromise verdict. The majority decision below is, therefore, in conflict with this Court's reasoning in *Price*.

Whenever a jury is given the right to determine crime and punishment as is the case under the D.C. rape statute, it is unrealistic to rule out the possibility of compromise or to assume that questions of guilt and punishment are not commingled.

Finally, the prosecutor's closing arguments were prejudicial because they rediculed petitioner's alternative defenses which held the prosecutor to its burden of proving both elements of the alleged crime: (1) that intercourse took place between petitioner and the complaining witness and (2) that the complaining witness did not consent.

## ARGUMENT

### I. THE CONSTITUTIONALLY INVALID DEATH SENTENCE INSTRUCTION GAVE THE JURY AN IMPERMISSIBLE CHOICE OF VERDICTS

#### A. This Court's Decision in *United States v. Jackson* Rendered Unconstitutional the Death Penalty Provision of the D.C. Rape Statute

This case was erroneously tried as a capital case and petitioner's constitutional right to a fair trial was prejudiced thereby. At the time of trial the rape statute in the District of Columbia (22 D.C. Code 2801) provided in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will, * * * shall be imprisoned for not more than thirty years: *Provided*, that in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: . . .[1]

---

[1] The death penalty provision was in effect at the time of petitioner's trial. It was later declared unconstitutional on authority of *United States v. Jackson*, 390 U.S. 570 (1968) and ordered stricken from the statute. *Bailey v. United States*, 132 U.S. App. D.C. 82, 405 F.2d 1352 (1968). Congress eliminated the death sentence for rape in the D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §20, 84 Stat. 473, 600, amending D.C. Code Ann. §22-2801 (1970). The legislative history indicates that the background for the amendment is *United States v. Jackson* 390 U.S. 570 (1968).

The death sentence provision of the D.C. rape statute is indistinguishable from the death sentence provision of the Federal Kidnaping Act which this Court struck down in *United States v. Jackson*, 390 U.S. 570 (1968).[2] Indeed, the jury's discretion to recommend the death penalty is broader under the D.C. statute since it applies "in any case of rape" whereas the Federal Kidnaping Act authorizes the death penalty only "if the kidnaped person has not been liberated unharmed."

In *Jackson*, this Court found that the death sentence provision of the kidnaping statute violated an accused's Fifth Amendment right not to plead guilty and Sixth Amendment right to trial by jury. This Court said:

> . . . Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See *Griffin v. State of California*, 380 U.S. 309 (390 U.S. at 583)

and cited with approval (390 U.S. at 583) an opinion of the Supreme Court of Nevada which held unconstitutional a state penalty scheme giving the jury the right to impose the death penalty for forcible rape resulting in great bodily injury.[3]

---

[2]The Federal Kidnaping Act, 18 U.S.C. 1201 (a) provides:

> Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnaped * * * and held for ransom * * * or otherwise * * * shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

[3]*Spillers v. State*, 84 Nev. 23, 436 P. 2d 18 (1968). By limiting the death penalty to "rape resulting in great bodily injury", the Nevada statute rates higher marks in making the punishment fit the

Based on *Jackson*, the Court of Appeals for the District of Columbia found the death sentence provision of the D.C. statute unconstitutional in *Bailey v. United States*, 132 U.S. App. D.C. 82, 405 F.2d 1352 (1968).[4] The question here, therefore, is whether the trial of this case as a capital case, including the constitutionally invalid death sentence instruction to the jury, was prejudicial error.

The dissenting opinion of Senior Circuit Judge Fahy found prejudicial error in this trial procedure and would order a new trial:

> . . . I think he is entitled to a new trial because the jury was erroneously permitted to consider the case as one in which the death sentence was permissible. At the beginning it was impressed upon the jury that this was a capital case, and again when the court so charged the jury as the trial was ending. The jury was deliberately chosen only from among those willing to attach the death penalty in case of a verdict of guilty, and the court

---

crime than the D.C. statute. Compare *Ralph v. Warden*, F.2d , No. 13,757 (4th Cir. decided December 11, 1970).

[4]The majority opinion in *Bailey* would limit the pronouncement of unconstitutionality of the death penalty to "only those defendants whose trials began after the *Jackson* decision, *id est*, after April 8, 1968." 405 F.2d at 1359. Certiorari was not sought in *Bailey*. Petitioner's trial took place in January 1968 and his conviction was pending on direct appeal to the Court of Appeals when *Jackson* and *Bailey* were decided. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc filed August 4, 1969 with the Court of Appeals argued, *inter alia*, that he was prejudiced by the death sentence instruction (A. 317, 323). Thus, petitioner is not seeking retrospective application of the *Jackson* rule because this is a direct appeal from a not yet final conviction which must be decided on the basis of presently existing law. *Linkletter v. Walker*, 381 U.S. 618 (1965). Even if this were a collateral attack on a final judgment of conviction *Jackson* should be applied retrospectively since the trial of this case as a capital case and the erroneous death sentence instruction undermined "the very integrity of the process" that decided petitioner's fate. Cf. *Witherspoon v. State of Illinois*, 391 U.S. 510, 523 (1968).

> charged the jury that although the Government was not seeking the death penalty, 'you may, if you wish to do so, add the words, "with the death penalty," to your verdict of guilty, if you find him guilty.' [Footnote omitted][5] (426 F.2d at 659)

The dissent concludes:

> We cannot surmise there was no likelihood of the jury considering the availability to them of the death sentence. We have no basis for such a surmise; and it is the erroneous availability of the death sentence, not the likelihood of its rendition, that gives rise to the prejudice. It may have exerted an undiscernible influence on jurors in deciding whether to find guilt, but without the death sentence, or not guilty. One or more jurors, with his or her attitude about the crime of rape reinforced by the statutory provision for a death sentence, might have been so influenced. As stated by the Second Circuit in *Wilkins, supra*, 348 F.2d at 867, it is sufficient if there is 'a reasonable possibility' of prejudice.
>
> For the court erroneously to give the jury a range of verdicts more severe than the law allows in the case on trial is for the court erroneously to influence the jury adversely to the accused. As a result the verdict rendered may be more severe than otherwise it would have been, even if not the most severe permitted by the erroneous instruction. (426 F.2d at 660-66)

As Judge Fahy points out "It is the erroneous availability of the death sentence, not the likelihood of its rendition,

---

[5] Not mentioned in the dissenting opinion is the following portion of the charge:

> If you do not wish to have the death penalty imposed, or if you are unable to agree that the death penalty should be imposed, then you should merely return a verdict of guilty. (A. 298)

that gives rise to the prejudice" and the damage was done when the Court erroneously gave the jury "a range of verdicts more severe than the law allows in the case on trial." Not only did this instruction paint the crime as more heinous than it was but it gave the jury an impermissible option. The availability of the more severe verdict might have influenced the jury to render a guilty verdict not because they were convinced of appellant's guilt beyond a reasonable doubt, but as a compromise between finding defendant "not guilty" and recommending capital punishment. The jurors doubts might have been resolved by turning to the verdict which was less severe but which would not entirely acquit petitioner of guilt.

### B. The Possibility of a Compromise Verdict Was Enhanced by the Non-Compelling Evidence of Guilt

Four of the judges on the Circuit Court of Appeals (Senior Judge Fahy, Chief Judge Bazelon and Judges Wright and Robinson) joined in Part I of the dissenting opinion which would reverse on the ground that the evidence was insufficient to sustain petitioner's conviction.[6] Even the majority opinion suggests that the evidence of guilt was less than compelling:

> . . . Admittedly, the trial and this record is not a model of symmetrical components — but difficult criminal trials seldom are; this is inherent when none but victim and attacker are present. What does emerge from the record, however, is the critical importance of credibility on the key issue of consent.
>
> * * *

[6] Petitioner contends that this is an independent ground for reversal for the reasons set forth in Part I of the dissenting opinion.

> . . . We cannot say their verdict on this point was without reasonable foundation, and whatever our own resolution might be were we to decide the fact issues – had we been the triers – this verdict was within the proper range of permissible alternatives for the finders of fact. (A. 313)

The bizarre circumstances surrounding the alleged crime are described in the dissenting opinion. Rather than attempt to argue anew the non-compelling nature of the evidence, we reproduce below the discussion appearing in the dissenting opinion annotated with record citations.

> Appellant's conviction rests upon the testimony of the complaining witness, not significantly strengthened by the testimony of others. She testified that she was a nurse at St. Elizabeth's Hospital. Driving to her work there one morning about 6 a.m. her car became sabled near a gas station. She went to a telephone booth and called her husband. At about the same time appellant drove into the same station and offered her his help, which she accepted. (A.27) With his car he pushed her car with her in it to a parking place on the grounds of St. Elizabeth's near the building where she worked. As she was getting out of her car appellant went over to it and pushed her back in, telling her to move over so he could come in on the same seat.[1] She pointed out the "console" barrier which prevented this (A.28). He then took hold of her arm and pulled her into his car. There was no outcry, no

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[1] Q. On cross-examination the complaining witness responded to questioning about this as follows: (R. 52)

Q. Now, what did you say, if anything, when he pushed you back in?

A. I don't remember saying anything.

She repeated this. Then this occurred:

A. He told me to move over.

Q. What did you say in response to that, if anything?

A. I said I couldn't move over.

word of protest, no word or act of resistance.[2] Still holding her arm he drove off to a service station telling her on the way that she would not be hurt if she did not scream.[3]

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[2]On cross-examination she answered defense counsel's inquiries as follows: (A. 55)

Q. Did you scream at any time from the time he took you from your car to his?

A. No I didn't.

Q. Did you make any noise?

A. No I didn't.

[3]She also testified that "he said that he knew I was scared because I was so nervous" and that she explained her condition to appellant as follows: "I told him I had a thyroid condition and this made me nervous anyway."

He stopped at a nearby gas station and there put his arm around her neck. The gas station attendant came right up to the car window. Appellant took money out of his pocket and paid through the window. Her mouth was free; only his arm was around her neck. No protest. No resistance. No word uttered or sign made (A.57-59). He drove off again to a secluded spot. On the way he told her where he worked and lived. Also during the ride he told her to take off her underclothes. No word of protest.[4] When they had stopped at the scene of the alleged crime he again told her that there would be no use in screaming and continued to converse with her. Responding to his questions, she told him she was married and had three children, but that she did not love her husband. He again

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[4]On cross-examination the complaining witness explained: (A. 61)

Q. Well, when he first asked you to take your underclothes off, what did you tell him, if anything?

A. I didn't say anything.

Q. You didn't say anything. You pretended like you didn't hear him?

A. I just didn't say anything.

told her to take off her underclothes and she complied (A.60-63). No word of protest. No importunity.[5] No force.

He drove her back to her place of work. He told her he would come back at three o'clock to start her car for her but she would probably have policemen. She said, "No, I wouldn't." He then asked her for the key to her car. She took it off the key ring and gave it to him. He asked her for a piece of paper to write on, which she gave him out of her purse. He wrote on it his correct phone number and a name – Charles – not his own, and gave it to her. She told him her name was "Luella." (A. 32) He did return as he said he would, with battery cables to help get her car started, and was arrested.[6]

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[5]She testified as follows on cross-examination: (A. 64)

Q. . . .Now, at any time during this entire time, did you ever tell him no?

A. No what?

Q. That you didn't want to do this, whatever he was going to do?

A. No, I only kept begging him to take me back to work.

Q. That's all. And you never said no; you never tried to stop him; you never put your hand up; and you never cried out. Is that correct?

A. He had told me if I wouldn't scream, he wouldn't hurt me.

[6]She testified that she went immediately to her supervisor to report the incident; (A. 33) however the testimony of her supervisor places her arrival in a different light. She testified that when the complaining witness arrived she was emotionally upset and asked for time off, explaining that she didn't feel that she could perform her duties. Later, in a private inner room, when the supervisor asked her what had happened and why she was late and thought she needed the day off she explained about being "accosted." (A. 173-175).

When confronted with a close question with respect to petitioner's guilt, the jury was particularly vulnerable to

any compromise suggestion. In this context, there is a real possibility that the jury reached a compromise between a verdict of guilty with the death penalty and a verdict of "not guilty" rather than continue the debate as to petitioner's innocence.

### C. The Constitutional Error Was Not Harmless

The Government's memorandum in opposition to the granting of the Petition for a Writ of Certiorari concedes that the death sentence instruction was "erroneously before the jury" but suggests that the error was harmless since it related not to guilt but punishment. As we show below, this attempted distinction is more metaphysical than real: While it might have validity in other contexts,[7] it is meaningless when viewed in the framework of the D.C. rape statute which combines the issue of guilt with capital punishment and contemplates the weighing of both as part of a single verdict. More important, the error here was constitutional error which imposed "an impermissible burden upon the assertion of a constitutional right" (*United States v. Jackson*, 390 U.S. at 583). Like *Jackson*, the constitutional defect here strikes at the heart of the guilt-determining process to the extent that those who are not obviously guilty are induced to plead guilty under threat of the death penalty.[8] In short, the death sentence provision subjected petitioner to an unconstitutional condition upon the exercise of his constitutional rights.[8]

Given the fact that the error was unconstitutional in character, the law is settled and the test is clear. In *Chapman v. State of California*, 386 U.S. 18, 24 (1967) this Court held:

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[7] As, for example, in a bifurcated trial.

[8] Cf. Poe, *Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions*, 37 George Washington Law Review 719 (1969).

> . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.[9]

A declaration that the constitutional error here "was harmless beyond a reasonable doubt" is inherently impossible. To do so would require an inquiry into the deliberations of the jury in weighing the evidence of guilt and a determination that the jurors individually and collectively were not influenced by the death sentence instruction; that it did not serve as "make[s]weight[s] in a compromise verdict" *Jackson v. Denno*, 378 U.S. 368, 380 (1964) quoting with approval from *Stein v. New York*, 346 U.S. 156, 177-178 (1953) – an exercise which this Court properly has rejected.[10]

---

[9] See also *Harrington v. California*, 395 U.S. 250 (1969).

[10] *Jackson v. Denno*, 378 U.S. at 379. See also *Kotteakos et al v. United States*, 328 U.S. 750, 764-765 (1945) which articulates the following standard with respect to nonconstitutional prejudicial error:

> . . . And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. [citations omitted] . . . This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected . . . .

## II. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *PRICE V. GEORGIA*

The dissenting opinion of Judge Fahy explains how petitioner was prejudiced by the death sentence instruction. The majority decision below is silent with respect to the *Jackson* rule and the compromise verdict issue and disposes of the case on other grounds.

The possibility that a compromise verdict might result from a jury's exposure to an illegal charge was first pointed out in *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), cert. denied, 383 U.S. 913 (1966). In *Wilkins*, an instruction on first degree murder was given the jury in a case in which it was held the accused was not then triable for a crime more serious than second degree murder. The defendant was found guilty of second degree murder; nevertheless, the Court in an opinion by Circuit Judge Marshall, now Mr. Justice Marshall, stated:

> . . . [I]t is entirely possible that without the inclusion of the first degree murder charge, the jury, reflecting a not unfamiliar desire to compromise might have returned a guilty verdict on the first degree manslaughter charge on the same evidence. There is, of course, no basis for predicting with any confidence, that this would have been the outcome of the third trial if Hetenyi had not been prosecuted for first degree murder; but neither is there any basis for predicting, with any confidence, that this would not have been the outcome. To make this latter prediction on the basis of the sufficiency of the evidence would be to ignore reality and, in effect, to have judges make the choice entrusted to the jury. *Wilkins, supra*, 348 F.2d at 866.

The *Wilkins* rationale was adopted in a dissenting opinion by Mr. Justice Fortas in which Chief Justice Warren and Mr. Justice Douglas joined in *Cichos v. State of Indiana*, 385 U.S. 76 (1966). In *Cichos* the defendant was

tried for reckless homicide and involuntary manslaughter and was found guilty of reckless homicide which, under Indiana law, was the lesser offense. After the Supreme Court of Indiana granted a new trial, the defendant was again required to stand trial on both counts and again was found guilty of the lesser offense. This Court dismissed the writ of certiorari as improvidently granted in light of the Indiana statutory scheme and decisions of the Indiana Supreme Court holding that the defendant could not have been deemed to have been acquitted on the first count and that the second trial did not place him twice in jeopardy. The dissent by Mr. Justice Fortas stated:

> First, it exposed [defendant] to the hazards of prosecution and conviction for the more onerous offense. Second, it again gave the prosecution the advantage of offering the jury a choice – a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (C.A. 2d Cir. 1965), cert. denied, 383 U.S. 913 (1966). (385 U.S. at 81)

As pointed out in the opinion of Judge Fahy below:

> Though a dissenting opinion the majority of the Court cannot be said to have been in disagreement, since they disposed of the case on another ground, . . . (A. 345)

Between the first and second opinions of the Court of Appeals for the District of Columbia in this case, this Court in *Benton v. Maryland*, 395 U.S. 784 (1969) tacitly recognized the error implicit in placing an impermissible option before the jury and the possibility of a compromise verdict resulting therefrom but found no danger of a compromise verdict since the defendant

in that case was found guilty at the second trial of both offenses.[11]

The rationale of the *Wilkins* and *Cichos* cases with respect to compromise verdicts, however, was fully adopted by this Court in *Price v. Georgia*, 398 U.S. 323, 331-332 (1970) where Chief Justice Burger for a unanimous Court stated:

> Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (C.A. 2d Cir. 1965), cert. denied, *Mancusi v. Hetenyi*, 383 U.S. 913 (1966).

*Wilkins* and *Price* were double jeopardy cases in which the defendant at the first trial was convicted of the lesser included offense and thereafter had to stand trial a second time for the more serious offense. The error consisted of placing the defendant twice in jeopardy for the same crime and in permitting the constitutionally invalid charge of the more serious crime to be considered by the jury. The opinion of Chief Justice Burger in *Price* emphasizes that this is the stuff of which compromise verdicts are made. The mischief of the constitutionally invalid death sentence charge here is indistinguishable from the situation in *Price* because here, like in *Price*, "we cannot determine whether or not the [murder] charge against petitioner induced the jury to find him guilty . . . rather than to continue to debate his innocence." (398 U.S. at 331).

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[11] In Footnote 17 to its opinion, 395 U.S. at 798 this Court said:

> There is no danger here that the jury might have been tempted to compromise on a lesser charge because of an erroneous retrial on a greater charge. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, (C.A. 2d Cir. 1965), cert. denied, *sub nom. Mancusi v. Hetenyi*, 383 U.S. 913, (1966). Larceny is a lesser offense than burglary.

It is no answer to suggest, as the Government does in its reply to the Petition for Certiorari, that "here the matter erroneously before the jury related, not to the question of guilt or innocence, but to the separate issue of punishment." The D.C. rape statute makes no clear-cut distinction between the issue of guilt and punishment but merely gives the jury discretion to add the words "with the death penalty" to its guilty verdict. The jury had three possible verdicts: (1) not guilty; (2) guilty as charged; or (3) guilty with the death penalty. In this context, a guilty verdict may reasonably be viewed as a compromise between the two extremes, i.e., a conviction for the lesser included offense. Moreover, this Court's decision in *Green v. United States,* 355 U.S. 184 (1957) impliedly rejects the notion that punishment is a separate issue. Green had been tried in the District of Columbia for first degree murder and arson and convicted of second degree murder and arson. After a successful appeal, he was retried and convicted of first degree murder and arson and sentenced to death. This Court held that Green's appeal from this first conviction did not waive his Fifth Amendment rights against double jeopardy. Significant here is the fact that Green's second degree murder conviction was actually a conviction not for a lesser-included offense, *but only for an offense with a lesser punishment.* This results from the differences under the District of Columbia Code between first-degree murder and felony-murder such as that charged in *Green.*[12] While

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[12]D.C. Code, 1951, §22-2401. "Whoever, being of sound memory and discretion * * * without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in Section 22-401 * * * is guilty of murder in the first degree."

Section 22-2404 provides that the "punishment of murder in the first degree shall be death by electrocution."

D.C. Code, 1951, §22-2403. "Whoever with malice aforethought, except as provided in [§]22-2401 * * * kills another, is guilty of murder in the second degree."

[continued]

under the felony-murder doctrine, intent to kill is not a necessary element, so long as the act and intent to commit the felony (arson) are made out, intent to kill must be established by the prosecution for a conviction of second degree murder. Because second degree murder requires an intent not needed for a felony murder conviction, the former cannot be said to be included in the latter. Rather than a lesser-included offense, *Green* involved an offense with a lesser punishment.

It is unrealistic to assume a clear-cut dichotomy between crime and punishment in the minds of the jury. Here, the charge even suggested the possibility of a compromise verdict:

> If you do not wish to have the death penalty imposed, or if you are unable to agree that the death penalty should be imposed, then you should merely return a verdict of guilty; and the Court will impose an appropriate penalty in due course. (A.561)

Crime and punishment were tied up in a single package — as required by the terms of the statute.

*United States v. Davidson*, 367 F.2d 60 (6th Cir., 1966) is instructive with respect to the propensity of juries to be influenced by punishment in reaching a verdict. In that case, the foreman of a jury deadlocked for three days inquired of the trial judge as to whether the jury had the right to ask for leniency in the event of a guilty verdict. Within one half hour after the court responded in the affirmative, the jury found the defendants guilty with a recommendation for leniency. In reversing the convictions, the Court said:

> We conclude under all the facts and circumstances of this case that the trial judge's comments to the jury with reference to leniency was prejudicial to

§22-2404. "The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years."

> the defendants and that it was conducive to a compromise verdict. We can understand the reluctance of a trial judge to declare a mistrial, after a long and carefully tried case, because of the disagreement of the jury. However, in our system of jurisprudence it is bound to happen on occasion. The only safe procedure to follow is to limit the jury strictly to its function of determining the guilt or innocence of the defendant.[13] (367 F.2d at 65)

That compromise verdicts may arise in contexts other than double jeopardy cases was recognized by this Court's opinion in *Stein v. People of the State of New York*, 346 U.S. 156 (1953) and *Jackson v. Denno*, 378 U.S. 368 (1964). In *Stein* this Court reviewed the New York procedure of submitting confessions to the jury with instructions that the jury determine whether the confessions were voluntary and to disregard such confessions if found to be involuntary. This Court upheld the conviction because it found abundant evidence – apart from the disputed confessions – to convict. Mr. Justice Jackson writing for the Court criticized the New York procedure because of the

> . . . absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and defnite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard. Courts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice. Defendants, when two or more issues are submitted, are entitled to instructions appropriate to discountenance, discourage and forbid such practice . . . . (346 U.S. at 177-78)

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[13] Cf. *Andres v. United States*, 333 U.S. 740 (1948).

*Jackson v. Denno*, 378 U.S. 368 expressly overrules *Stein*. However, Mr. Justice White writing for the Court quoted with approval the above language from *Stein* (378 U.S. at 380) and embellished on the vice inherent in compromise verdicts:

> The danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon the voluntariness, as well as its conclusion upon that issue itself, is sufficiently serious to preclude their unqualified acceptance upon review in this Court, regardless of whether there is or is not sufficient other evidence to sustain a finding of guilt . . . . (378 U.S. at 383)
>
> Under the New York procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness . . . As a consequence, it cannot be assumed, as the Stein Court assumed, that the jury reliably found the facts against the accused . . . The admixture of reliability and voluntariness in the considerations of the jury would itself entitle a defendant to further proceedings in any case in which the essential facts are disputed, for we cannot determine how the jury resolved these issues and will not assume that they were reliably and properly resolved against the accused . . . (378 U.S. at 386-387).

Enough has been said, petitioner submits, to invalidate his conviction as the product of an unconstitutional charge to the jury and a possible compromise verdict. The constitutional error is conceded; its effect upon the jury's deliberations in a close case cannot be minimized. In *Price* and other decisions discussed above, this Court has recognized compromise verdict possibilities in similar circumstances. The rationale of the minority opinion below is inescapable. *Price* has made it the law of the land.

Petitioner has raised the constitutional issue here in a direct appeal from his conviction. Whether other rape con-

victions under the same statute may be challenged in collateral proceedings need not here be determined. In any event, it does not appear that a reversal here on constitutional grounds would create a hardship upon the administration of justice.[14]

## III. PETITIONER WAS PREJUDICED BY THE PROSECUTOR'S CLOSING ARGUMENTS MISCHARACTERIZING THE DEFENSE

Petitioner's defense at the trial presented two distinct issues: (1) whether the Government's case in chief as a matter of law established a prima facie case of rape; and (2) whether as a matter of fact intercourse had taken place. The defense did not argue that the complaining witness consented to intercourse with petitioner. It simply argued that taking the Government's evidence at fact value there was insufficient evidence that petitioner had carnal knowledge of the complaining witness 'forcibly and against her will.'

During the course of his closing argument, the Assistant U.S. Attorney misrepresented these permissible alternative defenses[15] and told the jury that appellant was asking that they believe "there was not crime, if there was a crime there was consent, and lastly, 'my man didn't do it.'" (R.259).

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[14]There have been 60 rape convictions in the District of Columbia during the last five years for which figures are available:

1969 – 18
1968 – 22
1967 – 10
1966 – 8
1965 – 2

Source: Administrative Office, United States Courts.

[15]The appropriateness of alternative defenses is settled (See *Whittaker v. U.S.*, 108 U.S. App. D.C. 268, 281 F.2d 631 (1960) and recognized in the opinion below. A.328,337.

In any effort to rationalize the jury's verdict in this case, these comments must be taken into consideration. The concept of alternative defenses in a rape case is difficult enough for lawyers to grasp; to expect a lay jury not to be influenced adversely to petitioner by these comments is to expect the impossible. If the jury accepted or was influenced by the characterization of the defense by the prosecutor, the entire credibility of petitioner's case was seriously prejudiced. A jury quite obviously would have been free to discount petitioner's testimony had he in fact said that no act of intercourse took place and Mrs. Mayes was a willing participant to that act of intercourse. However, this was not the testimony. Yet, it was precisely this impression that the prosecutor attempted to create.

During the closing argument, the prosecutor made the following remarks:

> Mr. Ianni has done a wonderful job of defending a phantom who, according to his testimony, never committed a crime because there was none committed; because he takes a sword, and he swings it at you both ways. He is saying to the jury that if it happened, there was consent. That is the first swing. But as he takes the sword and swings back the other way, he says this man didn't do it, he wasn't there. He's using a shotgun there, it's like standing back of a shotgun, the further you get back the wider the pattern grows. (A.258).
>
> * * *
>
> How can you argue finally when a man says there was no crime, if there was a crime, there was consent, and, lastly, 'my man didn't do it'? (A.259). Mr. Ianni would have you believe it was intimate love at first, . . . (A.262).
>
> * * *
>
> Can you argue a case against Mr. Ianni. Again he says there was no crime, and if she was raped, it was consent, and if it was consent, regardless, his man didn't do it. (A.263).

Not only do these remarks exceed permissible bounds of fair comment, there is not a single element of truth to them. Defense counsel never suggested an "intimate" love scene; never suggested that the complaining witness consented to sexual intercourse with petitioner; was not guilty of a "charade" or a "shotgun" defense. Petitioner did not testify that Mrs. Mayes *consented*, he testified that there was no intercourse (A.206). The defense was not that Mrs. Mayes consented, but rather that the Government had failed to prove lack of consent.

The difficulty with the prosecutor's misstatements is not that they distort petitioner's testimony but that they ridicule permissible alternative defenses to the crime of rape in a manner which affected petitioner's credibility in the minds of the jury. Petitioner had every right to insist that the Government prove both elements of the crime ("carnal knowledge" and "forcibly and against her will") without having his position ridiculed. By so doing, the prosecutor violated the standard of conduct prescribed by this Court for criminal prosecutions.[16] Such action is "offensive to the dignity and good order with which all proceedings in Court should be conducted." *Vierick v. United States*, 318 U.S. 236, 248 (1943). In *Corley v. U.S.*, 124 U.S. App. D.C. 351, 365 F.2d 884 (1966), the Court of Appeals ruled that where the Government's evidence was not strong, prejudicial statements by the prosecutor were sufficient grounds for reversal, even where defense counsel had not objected to the specific remarks in question. The factual context of *Corley* is similar to that in the instant case. In *Corley*, the prosecutor misstated testimony of certain alibi witnesses. Given the general weakness of the Government's case the Court concluded:

> But for the prosecutor's misstatements, the jury might well have found that the alibi testimony created a reasonable doubt. (365 F.2d at 885).

[16] *Berger v. United States*, 295 U.S. 78, 88 (1935).

Given the weakness of the Government's evidence on the consent issue, the misrepresentation by the prosecutor of the defense position may well have served to weaken or remove reasonable doubts the jury might have otherwise entertained.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed. In the alternative, the case should be remanded for a new trial as a non-capital case without the death sentence instruction.

Respectfully submitted,

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By Appointment of the
Supreme Court

January 21, 1971

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No. 69-47

# In the Supreme Court of the United States

OCTOBER TERM, 1970

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[illegible] JOSEPH JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 5247

BARRINGTON JOSEPH JOHNSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the panel of the court of appeals (App. 306–315) is not reported; the *en banc* opinion of the court of appeals on rehearing (App. 328–337) is reported at 426 F. 2d 651.

### JURISDICTION

The *en banc* judgment of the court of appeals was entered on March 23, 1970. On April 9, 1970, Mr. Justice Marshall granted an extension of time to May 22, 1970, within which to file a petition for a writ of certiorari. The petition was filed on May 18, 1970, and was granted on October 19, 1970.

## QUESTIONS PRESENTED

1. Whether this Court's decision in *United States* v. *Jackson*, 390 U.S. 570, should be applied retroactively to question the validity of a prior rape conviction—pending on direct appeal when *Jackson* was decided—based on a jury verdict which did not contain a recommendation for the imposition of the death penalty.

2. Whether, if *Jackson* should be applied, petitioner was prejudiced by the fact that the jury was instructed that it could recommend imposition of the death penalty.

3. Whether there was sufficient evidence of lack of consent by the complainant to support the verdict.

4. Whether the prosecutor's closing argument was within permissible bounds in characterizing petitioner's defenses as inconsistent.

## STATUTE INVOLVED

22 D.C. Code 2801, as in force at the time of petitioner's trial, provided in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will * * * shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of having raped Mrs. Louella Mayes on January 22, 1967, in violation of 22 D.C. Code 2801. The jury did not impose the death sentence and on February 23, 1968, petitioner was sentenced by the court to a term of imprisonment of from six to eighteen years. A panel of the court of appeals affirmed the conviction on June 20, 1969, one judge dissenting (App. 306–316). The court of appeals subsequently granted a petition for rehearing *en banc* and affirmed the conviction, four judges dissenting as to the sufficiency of the evidence and three judges dissenting on the issue whether the giving of the death penalty instruction required reversal (App. 328–347).

The government's evidence showed the following: Mrs. Mayes, a Nurse's Assistant in the Geriatrics Division of St. Elizabeths Hospital, testified that in the early morning of January 22, 1967, she left her home by car for St. Elizabeths Hospital to start work in the 7:00 a.m. shift. While en route, at approximately 6:20 a.m., her car stalled five or six blocks from St. Elizabeths near a gasoline station. She asked the attendant at the station for assistance and telephoned her husband to inform him of what had happened to the car. While she was in the telephone booth, petitioner drove into the station. He walked over to the phone booth and asked her what was wrong (App. 25–27, 46–50). On being informed that her car had stalled, petitioner offered to push it to St. Eliza-

beths Hospital. After conferring with her husband on the phone and being advised by the attendant that her car battery was apparently dead, Mrs. Mayes accepted the offer. Using his own car, petitioner then pushed Mrs. Mayes' vehicle to a point near the parking lot of the Geriatrics Division of St. Elizabeths. Mrs. Mayes inquired whether this was as far as he was going to push her and petitioner replied that someone in another car was blinding him with his lights. When the persons in that car had left, leaving the parking lot deserted, petitioner proceeded to push Mrs. Mayes' car into a space in the parking lot (App. 27–28, 49–52). As Mrs. Mayes was about to leave her car, petitioner approached and told her to move over. Mrs. Mayes said she could not since her front seat was divided by a console (App. 28, 52–53). Petitioner then pulled her by the arm from the car and put her in the front seat of his car by the driver's side. He got in beside her and drove off the hospital grounds, all the time holding her arm (App. 28, 53, 53–57, 75). Mrs. Mayes testified that she did not scream at this time and was "scared to death" (App. 55). She testified that petitioner told her that he knew she was scared because she was very nervous. Mrs. Mayes informed petitioner that she was suffering from a thyroid condition which added to her nervousness. While they were riding petitioner repeatedly told Mrs. Mayes that if she did not scream he would not hurt her (App. 28–29).

About five minutes later, petitioner drove into a gas station, putting his arm around Mrs. Mayes' neck and

warning her not to scream. The pressure on her neck coupled with her thyroid condition caused her to breathe heavily. While at the gas station, she made no outcry. After purchasing a dollar's worth of gas, petitioner drove to a deserted street where there were no cars or houses nearby (App. 29, 42–43, 57–59). En route, he asked her to take off her underclothes (App. 61).

After stopping his car, petitioner told Mrs. Mayes that there was no point in screaming because no one would hear her (App. 30). In response to some personal questions, Mrs. Mayes advised petitioner that she was married and had three children but did not love her husband (App. 30, 60). Petitioner then stated: "I told you to take your underclothes off" (App. 30, 61). When he started to reach for her, Mrs. Mayes told him that she would remove them herself and removed her stockings, girdle and panties (App. 30, 61–62). Petitioner thereupon pushed Mrs. Mayes down on the seat, pulled up her skirt, and had sexual relations with her, reaching ejaculation (App. 30–31, 63–64).

While petitioner was having sexual relations with her, Mrs. Mayes kept begging petitioner to take her back to work (App. 64). In addition, in order to make him stop, she at one point stated that she thought she heard cars and that the police were coming. Petitioner lowered the window of the car and informed her that there were no cars (App. 31, 79). Mrs. Mayes testified that during the entire time she was with petitioner, she thought he was going to kill

her although she never saw a weapon (App. 30, 58, 75).

After the act, petitioner told her to put her clothes on, that he was taking her back to work. As they drove back, petitioner said he guessed that he would never see her again; he stated that he would come back to St. Elizabeths to help her start her car but thought that she would probably have policemen everywhere. Mrs. Mayes replied that she would not call the police (App. 31–32).

On returning to the hospital grounds, petitioner took the keys to Mrs. Mayes' car and gave her a piece of paper with the name "Charles" and his correct phone number. He then drove her to the building where she worked, admonishing her not to look back to try to get his license number (App. 32–33, 67).

Upon entering the Geriatrics Building around 7:30 a.m., Mrs. Mayes went directly to the office of the acting supervisor, Mrs. Fushee, to tell her what had happened (App. 33, 68, 76, 173).[1] Mrs. Fushee called the head nurse and the 11th Precinct was notified. When the police arrived, Mrs. Mayes gave them a statement relating the events. She was later taken to D.C. General Hospital where she was examined

[1] Mrs. Fushee testified as a defense witness that when she first saw Mrs. Mayes, she appeared very upset and asked whether she could be relieved that day because she felt she could not perform her duties (App. 173–174). Upon taking her into the office, Mrs. Fushee noticed that Mrs. Mayes appeared to be trying to control her emotions. At this time, Mrs. Mayes started to cry and told her that she had been "accosted" (App. 174–175).

(App. 33–34). The tests confirmed recent sexual relations (App. 99–102).

On the basis of Mrs. Mayes' information and a description of petitioner's car, police apprehended petitioner that same afternoon in his car parked at the Geriatrics Division parking lot. Mrs. Mayes was returned to the scene and identified petitioner as the man who had raped her (App. 34–35, 104–107, 113). At that time, the police obtained Mrs. Mayes' car keys from petitioner and seized a pair of her gloves found in the car (App. 36–37, 107–108, 113–114). Subsequent examination of petitioner's undershorts and Mrs. Mayes' panties revealed the presence of spermatozoa (App. 139–140). Other expert testimony linked fibers found on Mrs. Mayes' clothing with fibers on petitioner's sweater (App. 133–136).

Petitioner admitted at the scene that he had pushed Mrs. Mayes' car. He stated that she had given him her car keys and had asked him to return to start her car (App. 110–111, 114–115). At trial, petitioner testified to the same effect. He denied having had sexual intercourse with Mrs. Mayes or that she had been in his car. He gave no explanation, however, for the presence of her gloves in his car (App. 201–206, 228–229).

## ARGUMENT

### INTRODUCTION AND SUMMARY

22 D.C. Code 2801, as in force at the time of petitioner's trial in January 1968, provided that

> * * * in any case of rape the jury may add to their verdict, if it be guilty, the words "with

> the death penalty," in which case the punishment shall be death by electrocution. * * *

and if the jury should "fail to agree" as to punishment, the punishment should be imprisonment for not more than 30 years.[2]

Before the jury was selected, the prosecutor advised the jury panel that, although rape was a capital offense, the government was not seeking the death penalty.[3] In his closing argument, the prosecutor merely asked the jury to return a verdict of "guilty as charged" and did not allude to punishment (App. 248, 265).[4] Thereafter, at the close of his instructions, the trial judge charged (App. 297–298):

> Now there are two possible verdicts in this case—I want you to listen very carefully to this portion

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[2] Congress recently determined to eliminate the death penalty for rape rather than amend Section 2801 to conform with the holding of *United States* v. *Jackson*, 390 U.S. 570. See 84 Stat. 473, 600, part of the D.C. Court Reform and Criminal Procedure Act of 1970; see also H. Rep. No. 91-907, 91st Cong., 2d Sess.

[3] The prosecutor then inquired without objection whether, if any of the prospective jurors was opposed to capital punishment, this would preclude him or her from returning a verdict of guilty if the evidence so showed. Only one woman responded. She indicated that the possibility of the death sentence would prevent her from returning a guilty verdict and was subsequently excused. (App. 13–14, 17–18). Even if, in the light of *United States* v. *Jackson*, 390 U.S. 570, it was error in this pre-*Jackson* case to compose the jury as if this were a capital case, such error—contrary to the assertion in the *en banc* dissenting opinion below (App. 343–344)—cannot be presumed to have prejudiced petitioner on the issue of guilt. See *Bumper* v. *North Carolina*, 391 U.S. 543, 545.

[4] Due to an error in printing, the closing arguments are set forth in the joint appendix out of place at App. 240–265.

> of my charge: The first is not guilty. Of course, if you find that the defendant is not guilty, that is the end of the case, and you should return your verdict to that effect.
>
> If, however, you are convinced beyond a reasonable doubt that the defendant is guilty of the crime of rape, then the statute provides that you may, if you unanimously agree to do so, recommend to the Court that the death penalty attach. *The government is not seeking the death penalty.* I repeat: *the government is not seeking the death penalty,* but you may if you wish to do so, add the words, "with the death penalty" to your verdict of guilty, if you find him guilty.
>
> If you do not wish to have the death penalty imposed, or if you are unable to agree that the death penalty should be imposed, then you should merely return a verdict of guilty, and the Court will impose an appropriate penalty in due course. [Emphasis supplied.]

No exception was taken to the charge. The jury, after less than two and one-half hours of deliberation, returned a verdict of guilty, remaining silent on the issue of punishment (App. 299–300).

Subsequently in April 1968, while the present case was pending on direct appeal to the court of appeals, this Court decided in *United States* v. *Jackson*, 390 U.S. 570, that the similar death penalty scheme under the Federal Kidnapping Act was unconstitutional and hence unenforceable because it improperly encouraged guilty pleas and waivers of jury trials, while penalizing those who asserted their innocence and right to a jury trial. In *Bailey* v. *United States*, 405

F 2d 1352 (C.A.D.C.), the court of appeals declared that, under the rationale of *Jackson*, the death sentence provision in the District of Columbia rape statute, involved here, suffered from the same infirmity and was invalid.[5] *Bailey* was similar to this case in that the jury's verdict of guilty had not included a death penalty recommendation, and the court of appeals rejected on the merits the argument made by petitioner here. The conviction in the *Bailey* case was affirmed.

A.

Petitioner contends that reversal of his conviction for rape is required because the jury was, under the retroactive illumination of *Jackson* and *Bailey*, erroneously told that it could impose the death penalty. He suggests that, because the jury was instructed that it could return a range of verdicts from not guilty to guilty with the death penalty, the actual verdict of guilty without the death penalty may have been the result of an improper compromise. In our view, petitioner's contentions should be rejected.

1. First, it is inappropriate to apply this Court's decision in *Jackson* to question the validity of a prior rape conviction based on a jury verdict which did not include a recommendation for the imposition of the death penalty. Applying the three criteria established by recent decisions of this Court for determining the

[5] The Court further determined (405 F.2d at 1359) that its determination that the death penalty provision of the rape statute was unconstitutional would affect only those defendants whose trials had begun after April 8, 1968, the date of the *Jackson* decision.

retroactive applicability of decisions of the Court, we examine first the purposes of the *Jackson* decision. The purposes of that decision—to end the needless encouragement of guilty pleas and waivers of jury trials and to avoid penalizing those exercising their right to a jury trial—will not be significantly advanced by requiring an examination into non-death jury verdicts rendered prior to *Jackson*. This defendant was not induced to give up his right to trial by jury. Applying the other two retroactivity criteria, we conclude that trial judges prior to *Jackson* were justified in relying on the validity of *Jackson*-type statutes in formulating their charges to juries and that there would be a substantial burden on the administration of justice were *Jackson* applied retroactively to cases such as this one.

2. Even if *Jackson* were applied to this case, however, we submit that petitioner was not prejudiced by the fact that the jury was charged that it could recommend imposition of the death penalty. Petitioner's reliance upon *Price* v. *Georgia*, 398 U.S. 323, and *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (C.A. 2), certiorari denied, 383 U.S. 913, is inapposite as the possibilities for jury compromise existing in those cases do not exist here. We stress three factors: First, it is most unlikely that the jury seriously considered imposing the death penalty as the government did not seek that punishment and there were few, if any, aggravating circumstances surrounding the crime. Second, even if the death penalty was considered, there was no need, as the trial judge

explicitly charged, for the jury to reach agreement on the issue. Thus, jurors who might have had doubts about petitioner's guilt could not have been pressured into giving up their doubts by other jurors expressing a willingness to drop their insistence on the death penalty, as such willingness was not a necessary precondition to the return of a unanimous verdict. Finally, there is no basis for assuming that the jury would disregard their instructions and commingle the issues of guilt and punishment in their deliberations.

B.

In response to petitioner's other contentions, we argue, first, that the majority of the court of appeals correctly concluded that the evidence before the jury was sufficient to support a finding that the victim had not consented to sexual intercourse, and finally that the prosecutor's comments during summation on petitioner's alternate theories of defense were not improper.

I

THIS COURT'S DECISION IN UNITED STATES V. JACKSON DOES NOT IMPAIR A PRIOR CONVICTION BASED ON A JURY VERDICT WHICH DID NOT CONTAIN A RECOMMENDATION FOR THE IMPOSITION OF THE DEATH PENALTY

Under recent decisions of this Court, three criteria are employed to determine whether and to what extent a decision of the Court establishing a new or changed rule of criminal procedure should be applied to upset criminal judgments that were previously entered. Those criteria are (1) the purpose of the

rule; (2) the extent of reliance upon the prior rule; and (3) the effect that retroactive application would have upon the administration of justice. See *Halliday* v. *United States,* 394 U.S. 831, 832; *Desist* v. *United States,* 394 U.S. 244, 249; *Stovall* v. *Denno,* 388 U.S. 293, 297. The same criteria can appropriately be used here to determine the extent of retroactive application of a decision striking down a penalty provision embodied in a federal statute. As the Court noted in *Desist, supra,* 394 U.S. at 249, the purpose to be served by the new rule is the foremost factor among the retroactivity criteria, and it is to that factor that we now turn.

The death penalty provision of the Federal Kidnapping Act was struck down in *United States* v. *Jackson,* 390 U.S. 570, because it imposed "an impermissible burden upon the exercise of a constitutional right" (390 U.S. at 572) and because the statute needlessly encouraged guilty pleas and waivers of jury trials (390 U.S. at 583). The purposes served by striking down the statute were thus to remove the burden on those electing a jury trial and to end the needless encouragement of guilty pleas and jury trial waivers. The two classes of defendants most directly affected were clearly those defendants who, prior to *Jackson,* had insisted on a jury trial and as a result, had been sentenced to death upon a recommendation from the jury, and those defendants who had pleaded guilty or waived jury trials at least in part to avoid the risk of incurring the death penalty. The application of *Jackson* to both these classes of defendants has been determined by this Court.

In *Pope* v. *United States*, 392 U.S. 651, the Court, acting on the government's suggestion, vacated a death sentence imposed under the Federal Bank Robbery Act (which was conceded to suffer the same constitutional infirmity as the Federal Kidnapping Act) and remanded the case for resentencing. There was no question but that Pope had in fact been penalized as a consequence of his exercising his right to a jury trial. Moreover, the very provision of the statute under which Pope was sentenced—the death penalty provision—was, under the *Jackson* holding, invalid. Execution of Pope under such circumstances would clearly be inconsistent with the primary thrust of the *Jackson* decision; accordingly, *Jackson* was applied retroactively to eliminate the death sentence.

Quite a different result was reached when the Court applied *Jackson* to prior pleas of guilty to kidnapping and second degree murder under analogous penalty schemes. See *Brady* v. *United States*, 397 U.S. 742; *North Carolina* v. *Alford*, No. 14, this Term, decided November 23, 1970. In both cases, the Court ruled that *Jackson* established no new criterion for assessing the voluntariness of guilty pleas (*Brady*, 397 U.S. at 747; *Alford*, slip op. 5) and that under the traditional standards both pleas were voluntary. Although neither decision was framed in terms of the retroactivity or non-retroactivity of *Jackson*, the decisions reflect a judgment that one of the purposes of *Jackson*—elimination of a needless encouragement to guilty pleas—did not in isolation require the invalidation of a prior guilty plea even though it could be shown, as in *Alford*, slip op. 2, that the guilty plea

was made specifically to avoid imposition of the death penalty. Thus, it is apparent that the factor controlling application of the *Jackson* principle is the avoidance of a statutory penalty for choosing a jury.

It is in the light of *Pope, Brady* and *Alford* that we turn to the applicability of *Jackson* to a previous trial where the defendant exercised his right to a jury trial and was found guilty, but did not receive the death penalty.[6]

In the next part of this brief, we argue that there is no basis for assuming that prejudice resulted in this case from the mere fact that the jury was instructed that it could impose the death penalty. Indeed, we believe that in *any* case where the death penalty was not in fact imposed by the jury, there is only an extremely speculative chance that the defendant was penalized by the defective punishment scheme in any material way, and so we urge that pre-*Jackson* guilty verdicts not recommending death should not be questioned. The distinction between *Pope* and the instant case is sharp in terms of the overriding purpose of *Jackson* to avoid penalizing those exercising their rights to jury trials. Where it is indisputable, as in *Pope*, that a person was so prejudiced, retroactive application is appropriate; where on the other hand any

[6] Of course, the present question, like the *Brady-Alford* question, would not have arisen had *Jackson* been foreseen: the jury would then not have been instructed about the death penalty, just as the judge would have explained to the pleading defendant that death was not a potential penalty.

prejudice is indirect and speculative at best, retroactive application is not appropriate. Indeed, *Pope* required only resentencing short of the death penalty, and cast no doubt on the guilty verdict, which is all that is involved here.

Petitioner asserts (Br. 10, n. 4) that *Jackson* should be applied retroactively here since the death sentence instruction undermined the integrity of the trial. While it is true that this Court has applied retroactively decisions fashioning rules designed to correct serious flaws in the fact finding process, see, *e.g.*, *Roberts* v. *Russell*, 392 U.S. 293, 294, *Stovall* v. *Denno*, 388 U.S. 293, 298, nothing in *Jackson* suggests that its purpose was to improve the quality of jury deliberations on guilt in capital cases. *Jackson* focused rather upon the penalty that could be imposed after a guilty verdict. This Court has never held that there is anything inherently suspect about submitting to a single jury questions of guilt and punishment.[8] The only

[7] Petitioner, citing *Linkletter* v. *Walker*, 381 U.S. 618, also asserts that the fact that this case was pending on direct appeal when *Jackson* was decided, mandates the application of that decision here without further inquiry. But the authority of *Linkletter* on this point was expressly undermined in *Desist* v. *United States*, 394 U.S. 244, 252–254, holding that *Katz* v. *United States*, 389 U.S. 347, would not be applied to decisions on direct review at the time of the *Katz* decision, but only to cases involving conduct occurring thereafter. A similar cut-off date is appropriate here, since only after the *Jackson* decision were trial judges on notice that death sentence instructions should not be given. This was the result reached by the court of appeals in *Bailey* v. *United States*, 405 F. 2d 1352, 1359 (C.A.D.C.).

[8] The impact of such a unitary proceeding on a defendant's privilege against self-incrimination is presently before the Court in *Crampton* v. *Ohio* No. 204, this Term, certiorari granted, 398 U.S. 936, argued at the December session.

reason that the jury's deliberative process is under attack here is because of the incidental presence of a statutory penalty scheme of the same type as was found objectionable to *Jackson*. Thus, the integrity of the jury's deliberations in this case is not brought into question by any basic principle of *Jackson*, but only as an incidental effect of an error under that decision which was made altogether harmless when the jury failed to recommend the death penalty. There is nothing in *Jackson* that requires its retroactive application to eliminate such an incidental and nonprejudicial effect.

The remaining two factors militating against retroactivity—justified reliance on the prior law and adverse effect on the administration of justice—also apply here, and suggest that *Jackson* should not be applied to this case. With the exception of the Nevada Supreme Court's decision in *Spillers* v. *State*, 436 P.2d 18, 22–23, the result in *Jackson* was not foreshadowed. On the other hand, prior to this Court's decision the reasoning of the district court in *Jackson* had been rejected by three other district courts. See *McDowell* v. *United States*, 274 F.Supp. 426, 429–431 (E.D. Tenn.); *Laboy* v. *New Jersey*, 266 F.Supp. 581, 584–585 (D. N.J.); *Robinson* v. *United States*, 264 F.Supp. 146, 151–152 (W.D. Ky.), affirmed (after *Jackson*), 394 F.2d 823 (C.A. 6), certiorari denied, 393 U.S. 1057.

Finally, reconsideration of all jury verdicts of guilty without recommendations of death returned under *Jackson*-type statutes would impose a substantial burden on the administration of justice. There

are presently approximately 50 persons in custody or on parole on pre-*Jackson* rape convictions under the D.C. statute following jury trials[9] and approximately the same number of federal prisoners in custody as of June 1969, following pre-*Jackson* jury trials for violation of the Federal Kidnapping Act,[10] although an unknown number of the latter prisoners may not have been charged in capital indictments. Finally, an undetermined number of state prisoners are in custody following jury trials for violations of statutes which either have been or may be construed to be defective under *Jackson*.[11]

## II

### PETITIONER WAS NOT PREJUDICED BY THE FACT THAT THE JURY WAS INSTRUCTED THAT IT COULD IMPOSE THE DEATH PENALTY

Even if *Jackson* does govern this case, petitioner's argument still depends on the presumption that the

[9] This figure was obtained as follows: Records of the Administrative Office of the United States Courts show that from 1952–1968, there were 171 convictions under the D.C. statute, of which 106 or 62 percent followed jury trials. D.C. Department of Corrections figures show a total of 71 prisoners in custody or on parole as of the filing of this brief who had been sentenced prior to April 8, 1968, the date of the *Jackson* decision. An estimated additional 9 prisoners are in the custody of the Bureau of Prisons for pre-*Jackson* rape convictions under the D.C. statute. Sixty-two percent of the total of 80 yields 50 persons now in custody who underwent pre-*Jackson* jury trials.

[10] Administrative Office figures show that there were 669 federal kidnapping convictions between 1951 and 1968, of which 184 or 28 percent followed jury trials. Twenty-eight percent of the 172 prisoners the Bureau of Prisons reports as in custody as of June 1969 for convictions prior to June 1968 is 48.

[11] See discussion at pp. 15–16 of our brief in *Brady* v. *United States*, No. 270, 1969 Term, a copy of which is being provided to petitioner's counsel.

jury verdict finding him guilty of rape was the product of a compromise between those on the jury who had doubts about petitioner's guilt and those in favor of imposing the death penalty. Otherwise, there would be no prejudice of any kind. Petitioner seeks to establish such a presumption by analogy to *United States ex rel. Hetenyi* v. *Wilkins*, 348 F.2d 844 (C.A. 2), certiorari denied, 383 U.S. 913, the rationale of which was adopted by this Court in *Price* v. *Georgia*, 398 U.S. 323. But those cases are not relevant here, and there is no other basis for the crucial presumption.

Both *Wilkins* and *Price* involved situations where, by virtue of the Double Jeopardy Clause, the defendant was improperly subjected to a second or third trial on a charge of first-degree murder, after a previous verdict of guilty of a lesser included offense had been reversed on appeal. Although in each case the later conviction was only for a lesser crime on which the defendant was properly triable, both cases held that the verdicts must be reversed. In *Wilkins*, the Second Circuit reasoned that submission of the barred parent count to the jury created a "reasonable possibility" of an improper compromise verdict. 348 F.2d at 864–867. In *Price*, the Court first concluded that, irrespective of the verdict reached at the second trial, the subjection of the defendant to a trial upon a charge for which he had previously been impliedly acquitted violated the Double Jeopardy Clause. The Court went on, in rejecting the State's claim of harmless error, to approve the *Wilkins* rationale, stating (398 U.S. at 331–332):

> * * * we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. See *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 (C.A. 2d Cir. 1965), certiorari denied, 383 U.S. 913 (1966).[12]

Assuming arguendo that *Jackson* retroactively forbids the placing of the death penalty issue before the jury in this case, it remains that the possible prejudice to petitioner from that factor was in no way comparable to the prejudice thought to exist in the *Wilkins* or *Price* situations.[13] Our position is based on three

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[12] The implications of *Price* are not wholly clear. The possibility of compromise, of course, exists whenever a jury returns a verdict of guilty of a lesser included offense, irrespective of whether the parent count was properly before the jury; *Price*, in our view, cannot and should not be read for the revolutionary proposition that all such verdicts are illegal. Although this Court has traditionally viewed compromise verdicts with disfavor, it has consistently held that such verdicts may not be impeached where to do so would violate the historic sanctity of the jury's deliberations and subject jurors to individual examination. See *Hyde* v. *United States*, 225 U.S. 347, 384–384; *Stein* v. *New York*, 346 U.S. 156, 178–179; cf. *Jackson* v. *Denno*, 378 U.S. 368. We interpret *Price* as holding that, although the possibility of a compromise verdict on a lesser included offense will not result in reversal where the various charges from which the possible compromise was spawned were properly before the jury, the same risk of compromise will not be accepted where one of the counts which the jury was told to consider was improperly submitted.

[13] The court of appeals in *Bailey* v. *United States*, 405 F. 2d 1352 (C.A.D.C.) rejected the analogy of *Wilkins* to rape cases

factors existing here, but not present in *Wilkins* or *Price:* (1) There was not a significant possibility in this case that the jury would recommend imposition of the death penalty; (2) there was no pressure on those jurors believing in petitioner's innocence to compromise their views; and (3) it cannot validly be assumed that the jury would ignore the instructions and commingle questions of guilt and punishment in their deliberations.

A. Two factors point to the improbability that the jury seriously considered sentencing petitioner to death. First, as we have noted, *supra,* pp. 8–9, the prosecutor advised the jury panel, prior to the selection of the jury, that the government was not seeking the death penalty, and this fact was emphasized by the trial judge in his charge (App. 298). Second, the nature of the crime was not such as to suggest consideration of the death penalty as there were virtually no aggravating circumstances.[14] The victim was not harmed (other than by the rape) and the use of force by petitioner to effect the rape did not rise to

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where, as here, the government does not seek the death penalty. Apparently on the basis of *Bailey*, the *en banc* majority opinion below does not discuss the *Wilkins* issue. Cf. *Gregory* v. *United States*, 410 F. 2d 1016, 1018, n. 2 (C.A.D.C.); *United States ex rel. Wolak* v. *Yeager*, 385 F. 2d 478 (C.A. 3), certiorari denied, 390 U.S. 999.

[14] Cf. pages 66–77 of our *amicus curiae* brief in *McGautha* v. *California*, No. 203, this Term, and *Crampton* v. *Ohio*, No. 204, this Term. We show there that juries imposing the death penalty ordinarily do so on the basis of the presence of fairly obvious aggravating factors. A copy of that brief is being provided to petitioner's counsel.

the level of viciousness or brutality.[15] While the victim was transported against her will to a quiet street, she was returned by petitioner to her place of employment. Under these circumstances, we submit that, as the court of appeals concluded in another rape case where the government had not sought the death penalty, it was "overwhelmingly improbable" that petitioner was the victim of a compromise stemming from the jury's consideration of the death penalty. *Springfield* v. *United States*, 403 F.2d 572, 573 (C.A.D.C.).

B. Even if it were concluded, however, that the jury might have seriously deliberated over the death penalty, there was no force on individual jurors to compromise comparable to what might have existed in *Wilkins* or *Price*. In each of the later two cases, the jury had the option of finding the defendant (1) guilty of murder (the impermissible count before the jury), (2) guilty of a lesser included offense or (3) not guilty. Assuming that some jurors felt the defendant was guilty of murder and others had grave doubts as to whether he was guilty of any crime, the

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[15] Compare *Ralph* v. *Warden*, No. 13,757, C.A. 4, decided December 11, 1970. In that case, the jury had imposed the death penalty after evidence had been admitted showing that the defendant had threatened to kill his victim and her child with a tire iron unless she submitted. The Fourth Circuit reversed, holding that imposition of the death penalty for rape violates the Eighth Amendment's prohibition against cruel and unusual punishment where the victim's life was neither taken nor endangered.

The court's opinion points out (slip op., pp. 17–18) that from 1960–1968, only 101 death sentences for rape were imposed in the civil courts, both state and federal, as compared with 190,790 reported rapes.

possibility of compromise existed. Before the jury could return a unanimous verdict of guilty of the lesser included offenses, those jurors believing the defendant guilty of murder would have to abandon their insistence on a verdict of guilty of murder and affirmatively consent to the lesser verdict; similarly, those jurors believing the defendant might be innocent would have to abandon their views on that score. Thus, one group might trade off its prerogative to hold out in order to bring the deliberations to a close.

The same dynamics could not reasonably be expected to prevail in a case like the present one. To be sure, as petitioner emphasizes (Br. 7), the jury had the option of returning one of three verdicts: (1) guilty with the death penalty, (2) guilty as charged, or (3) not guilty. And, as in the *Wilkins* and *Price* situation, the verdict returned had to be concurred in unanimously. It is also possible (although extremely unlikely, as we point out above) that some jurors felt that petitioner should receive the death penalty. What is critically different here is that, unlike the situation where those seeking a murder verdict must specifically abandon that quest and agree to the lesser verdict, it was not necessary for those jurors in favor of imposing the death penalty to abandon anything to enable the jury to return a verdict of guilty as charged, for their insistence on the death penalty necessarily presupposed a belief in petitioner's guilt of rape. Stated another way, the presence of the death verdict possibility *did not* alter the jury deliberations on petitioner's guilt from what they would have been

had the jury not been instructed about the death sentence. In either case, the ability to return a unanimous verdict depended upon *and only upon* resolution of petitioner's guilt or innocence. If all agreed he was guilty, deliberations could end since there was no further need, as the trial judge's charge explicitly indicated (see last quoted paragraph, p. 9, *supra*), to agree on the death penalty issue. Thus, the elements of a compromise—where each side must give up something to enable an issue to be resolved—were lacking; any juror believing petitioner was innocent was under no pressure stemming from the death penalty charge to compromise his view.

C. Finally, the instructions to the jury in this case were clear (see *supra,* pp. 8–9; App. 297–298): The jury was to determine first whether or not petitioner was guilty of rape; if convinced beyond a reasonable doubt of petitioner's guilt, then the jury could consider imposition of the death penalty. In the face of these clear instructions and upon the necessary presumption that juries are capable of following instructions, there is no basis for assuming that the jury so far departed from its instructed function as to commingle the questions of guilt and punishment in their deliberations.

Confidence in a jury's ability to follow instructions in a similar context was expressed by this Court in *Spencer* v. *Texas,* 385 U.S. 554, holding that the Due Process Clause of the Fourteenth Amendment does not require a separate jury trial on the issue of punishment under a state recidivist statute allowing the

jury to determine the issues of both guilt and punishment. Although noting that there were some possibilities of prejudice resulting from the unitary trial procedure and that a bifurcated trial as to punishment might be more fair, the court held that such speculative possibilities did not rise to the level of a violation of due process. In a passage particularly relevant here, the Court stated (385 U.S. at 565):

> It would be extravagant in the extreme to take *Jackson* [v. *Denno*, 378 U.S. 368] as evincing a general distrust on the part of this Court of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case * * *.

The principal focus of *Spencer* was on the possibility of prejudice arising from the introduction of evidence not germane to the issue of guilt but going solely to punishment.[16] Presumably, however, if the Court had thought there was a substantial possibility that the jury, in deciding the questions of guilt and punishment together, would arrive at a compromise verdict, it would not have found the unitary trial procedure compatible with due process.[17] In *Bruton* v.

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[16] By contrast, no such proof was introduced in this case.

[17] An issue similar to *Spencer* is pending before this Court in *Crampton* v. *Ohio*, No. 204, this Term, certiorari granted, 398 U.S. 936. The case raises the issue whether protection of a defendant's privilege against self-incrimination requires a separate trial on the question of punishment in a capital case. There, as in *Spencer*, the arguments *pro* and *con* seem to have centered on the potential for prejudice arising from the jury's simultaneous exposure to evidence bearing on the questions

*United States*, 391 U.S. 123, the Court reiterated its view that, except in rare situations like the one there dealt with, reliance on the jury's ability to follow instructions is justified. 391 U.S. at 135.[18] See also *Duncan* v. *Louisiana*, 391 U.S. 145, 157.

These decisions exhibit, we submit, a proper reliance on the jury system. This court has in recent years greatly expanded the jury trial right. *E.g.*, *Duncan* v. *Louisiana*, *supra*; *Bloom* v. *Illinois*, 391 U.S. 194; *Frank* v. *United States*, 395 U.S. 147; *O'Callahan* v. *Parker*, 395 U.S. 258; *Baldwin* v. *New York*, 399 U.S. 66. It would be inappropriate to link that development with a line of decisions reducing the sphere in which juries are assumed to act competently. Compare *Bruton* v. *United States*, *supra*. Save in rare instances, if the jury system is to be effective, the courts cannot afford to indulge the presumption that jurors do not properly perform their function in criminal cases of weighing the evidence in the light of the court's instructions.

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of punishment and guilt. If, however, the Court's opinion in *Crampton* were to speak to the unitary trial issue in terms of the rationale here relied on of an impermissible degree of likelihood of compromise, the decision would have relevance for this case. The United States has filed a brief as *amicus curiae* in *Crampton* which fully discusses this Court's prior decisions and other materials dealing with the ability of juries rationally to decide issues and to follow instructions in capital cases as well as generally. See Brief for the United States, pp. 66–82, 84–90, 107–125. Much of that discussion is pertinent here.

[18] Here, of course, the jury was instructed as to the elements of the offense, and that it should decide the question of guilt or innocence solely on the basis of the evidence presented (App. 289–295).

## III

### THE EVIDENCE AS TO LACK OF CONSENT WAS SUFFICIENT

Petitioner, while not discussing the question at length, relies on the dissenting opinion below for his contention (Br. 13–16) that the evidence as to lack of consent was insufficient. The facts detailed in the Statement (*supra*, pp. 3–7), fully support the contrary conclusion reached by the majority of the *en banc* court below. The majority properly held that Mrs. Mayes' testimony that she was in fear and thus acquiesced in sexual intercourse not voluntarily but in submission to the threats of petitioner was credible[19] and rationally rooted in the circumstances of the case. In effect, the majority also refused to impose on a woman threatened with death or bodily harm by an assailant the affirmative obligation to jeopardize her safety by physical resistance or an attempted public outcry.[20] This determination under a statute applicable only to the District of Columbia is reasonable and within the broad discretion which this Court has traditionally accorded to rulings by the court of appeals on local District of Columbia matters. See

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[19] In deeming Mrs. Mayes' testimony as to her fear to be incredible, we think the dissenting judges exceeded their permissible function since only the jury had the opportunity to view the witnesses. See *Hoffa* v. *United States*, 385 U.S. 293.

[20] The only place the record shows such an outcry might have been effective was the gasoline station where petitioner stopped en route to the rape location. But at that time, petitioner had his arm around Mrs. Mayes' neck and she had difficulty breaching. (See pp. 4–5, *supra*.)

*Fisher* v. *United States*, 328 U.S. 463, 476–477; *Griffin* v. *United States*, 336 U.S. 704, 715–718. We therefore submit that the holding of the majority as to the sufficiency of the evidence should be sustained.

## IV

### THE PROSECUTOR'S CHARACTERIZATION OF PETITIONER'S DEFENSES AT TRIAL AS INCONSISTENT WAS PROPER

Petitioner contends (Br. 25–28) that the prosecutor's closing argument was improper in that it characterized his defenses—(1) that there was no sexual intercourse, and (2) that, if there was, the government had not proved that the act was non-consensual[21]—as being inconsistent rather than merely "alternative".

The contention is insubstantial. Its rejection evoked no dissent in the *en banc* court below. And the majority's opinion, although declining to deal with the point explicitly, noted that petitioner had argued "inconsistent defenses" (App. 337). Petitioner's trial counsel did not consider the prosecutor's argument unfair and made no objection or motion for mistrial based upon the alleged mischaracterization of which petitioner now complains.

The prosecutor's argument (set forth at App. 240–248, 258–265), did not go beyond the bounds of permissible advocacy. Whatever the subtle distinction urged by petitioner here between inconsistent and alternative defenses, it is clear that his second conten-

[21] These defenses were argued to the jury by defense counsel (App. 248–258).

tion as to failure to prove lack of consent assumed the very fact which the initial contention denied: namely, that the act of sexual intercourse had occurred. The jury (and hence the prosecutor in closing argument) had the right to draw unfavorable inferences from this dual position (see App. 337). There is no objection to the charge on burden of proof, which made clear to the jury what the prosecution must prove to convict.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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# JOHNSON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 5247. Argued March 24, 1971—Decided April 5, 1971

138 U. S. App. D. C. 174, 426 F. 2d 651, certiorari dismissed as improvidently granted.

*William J. Lippman*, by appointment of the Court, 400 U. S. 940, argued the cause and filed briefs for petitioner.

*Samuel Huntington* argued the cause for the United States. With him on the brief were *Solicitor General Griswold*, *Assistant Attorney General Wilson*, and *Roger A. Pauley*.

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

In the petitioner's trial on a charge of rape, the District Judge instructed the jury that it could return a verdict of guilty with the death penalty. Yet that verdict was constitutionally impermissible in light of this Court's decision in *United States* v. *Jackson*, 390 U. S. 570. See *Bailey* v. *United States*, 132 U. S. App. D. C. 82, 86 and n. 3, 405 F. 2d 1352, 1356 and n. 3. I think the extreme prejudice arising from this erroneous instruction requires reversal of the judgment of conviction and a remand of this case for a new trial. Cf. *Price* v. *Georgia*, 398 U. S. 323, 331–332.